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[1940] I M. L. J.
January—June

PUBLISHED BY
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PRINTED AT THE MADRAS LAW JOURNAL PRESS, MYLAPORE.
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THE
MADRAS LAW JOURNAL

I] FEBRUARY [1940

MADRAS IRRIGATION CESS (AMENDMENT) BILL, 1940.*

OBJECT AND SCOPE.—The Madras Irrigation Cess (Amendment) Bill, 1940, seeks to consummate the policy inaugurated in 1900 regarding unauthorised user of government water for purposes of irrigation, by nullifying the effect of two important decisions of the High Court.[1] The Bill proposes to enable government to levy a cess even where the user of government water is wholly involuntary on the part of a ryot and also where water though taken from an authorised source is yet taken contrary to the prescriptions of the revenue authorities as to the time, method and conditions of supply.

PREVIOUS POLICIES AND PROVISIONS.—The preamble to the Irrigation Cess Act, 1865, specifically recited that cess on unauthorised use of water was to be by way of a fit return for the large sums of money spent by government in the construction and improvement of works of irrigation and drainage. The preamble was however wider than the operative part and cess was held leviable irrespective of the question whether any construction or improve-

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**A Bill further to amend the Madras Irrigation Cess Act, 1865, for certain purposes.*

WHEREAS it is expedient further to amend the Madras Irrigation Cess Act, 1865, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS IRRIGATION CESS (AMENDMENT) ACT, 1940.

Substitution of new section for section 1, Madras Act VII of 1865.

2. For section 1 of the Madras Irrigation Cess Act, 1865 (hereinafter referred to as the said Act), the following section shall be substituted, namely:—

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1. *Secretary of State* v. *Veeranna*, (1937) 1 M.L.J. 732: I.L.R, (1937) Mad. 772 (F.B.); *Ratnammal* v. *Secretary of State*, (1939) 2 M.L.J. 380.

ment had been effected or not.[2] The Act of 1865 had made levy of cess dependent on supply or user of government water. Supply implied previous request and user freedom to refuse.[3] There was then no intention to penalise involuntary user by the cultivation of crops taking advantage of water getting into one's land accidentally or by overflow, percolation or drainage. The position was fully recognised by Board's Standing Order 4, para. 7 which was in force before 1900. It stated: "Wet cultivation on dry lands with water which percolates from a government work is not liable to water rate. The landholder should be given the option of taking a full supply of water for his crop and in the event of his accepting the offer, he should be charged water rate, but should he refuse to take a full supply, no charge should be made for water which reaches his holding by percolation". This principle was entirely in accordance with the rule obtaining in all systems of jurisprudence that government has no right to water flowing underground. The law as to rivers and flowing streams has been held inapplicable to springs and waters beneath the earth's surface.[4] In *Ballard* v. *Tomlinson*,[5] Brett, M.R., observed: "The percolating water

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Power to levy water-cess in addition to assessment on land.

"1. (*a*) Whenever water is supplied or used for purposes of irrigation from any river, stream, channel, tank or work belonging to, or constructed by or on behalf of, the Crown, and

(*b*) whenever water from any such river, stream, channel, tank or work, by direct flow, or by indirect flow, percolation or drainage from or through adjoining land, irrigates any land under cultivation, or flows into a reservoir and thereafter, by direct flow, or by indirect flow, percolation or drainage from or through adjoining land, irrigates any land under cultivation, and in the opinion of the Revenue Officer empowered to charge water-cess, subject to the control of the Collector and the Board of Revenue, such irrigation is beneficial to, and sufficient for the requirements of, the crop on such land,

it shall be lawful for the Provincial Government before the end of the revenue year succeeding that in which the irrigation takes place to levy at pleasure on the land so irrigated a separate cess for such water, and the Provincial Government may prescribe the rules under which, and the rates at which, such water-cess shall be levied, and alter or amend the same from time to time:

Provided that where a zamindar or inamdar or any other description of landholder not holding under ryotwari settlement is by virtue of engagements with the Crown entitled to irrigation free of separate charge, no cess under this Act shall be imposed for water supplied to the extent of this right and no more:

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2. *Urlam case,* (1917) 33 M.L.J. 144 : L.R. 44 I.A. 166 : I.L.R. 40 Mad. 886 (P.C.).

3. *Venkatappayya* v. *The Collector of Kistna,* (1889) I.L.R. 12 Mad. 407; *Krishnayya* v. *Secretary of State,* (1895) I.L.R. 19 Mad. 24.

4. *Acton* v. *Blundell,* (1843) 12 M. & W. 324 : 152 E.R. 1223; *Chasemore* v. *Richards,* (1859) 7 H.L C. 349 : 11 E.R. 140.

5. (1885) L.R. 29 Ch.D. 115 at 121; see also *McNab* v. *Robertson,* (1897) A.C. 129.

below the surface of the earth is a common reservoir or source in which nobody has any property, but of which everybody has as far as he can, the right of appropriating the whole."

The Irrigation Cess (Amendment) Act, 1900, was designed to get rid of what was called the *paradox* that crops may be raised by means of government water without that water being either "supplied" or "used". Instead of merely penalising involuntary user of surface flow of water for purposes of irrigation the Act imposed the liability to pay cess even where advantage was taken of water percolating into one's land due to natural causes, for raising a crop. The Act made no provision whatever for damage likely to be caused to landowners from government sources of irrigation by percolation or overflow into their lands. In such cases the common law operated to negative compensation. If landowners are to pay for benefits received through involuntary flow from a government source, it is but fair and equitable that the correlative right should be given of receiving damages for loss sustained.

While the evil still stands unremedied the government proposes to take further power through the present Bill regarding the imposition of cess. The difference in the language employed between the second limb of the taxation section (S. 1) and the

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Provided also that no cess shall be leviable under this Act in respect of land held under ryotwari settlement which is classified and assessed as wet, unless the same be irrigated, whether voluntarily or involuntarily and whether wholly or in part—

(i) from any source hereinbefore mentioned, not being a source which has been assigned by the Revenue authorities or adjudged by a competent Civil Court as the source of irrigation of such land; or

(ii) from any source assigned or adjudged as aforesaid in respect of such land, otherwise than in accordance with any order of the Revenue authorities regulating the time, method and conditions of supply of water for the irrigation of such land from such source free of separate charge."

3 (1) No suit or other proceeding shall lie against the Provincial Government, or any officer or servant of the said Government, or any authority subordinate to them, or any person acting under the authority of or with the permission of the said Government, officer, servant or authority, in respect of any act done or purporting to be done before the commencement of this Act under section 1 of the said Act, if such act could have been done under the said section 1 as amended by this Act, and the Provincial Government and all officers, servants, authorities and persons aforesaid are hereby indemnified and discharged from all liability in respect of all such acts in so far as they could have been done under the said section 1 as amended by this Act.

Indemnification for acts done before the commencement of this Act.

(2) Any suit or other proceeding instituted before the commencement of this Act in respect of any act done or purporting to be done under section 1 of the said Act shall be disposed of as if the said section 1 as amended by this Act, had been in force at the time of the institution of the said suit or proceeding in the Court of first instance.

exemption clause (Proviso 2 to S. 1) had led the Courts to hold that unless there was irrigation by *using*,—*i.e.*, a voluntary user of water for purposes of irrigation, the liability to pay cess did not arise.[6] It was also further held on a construction of the language of the exemption clause that land held under ryotwari settlement and classified and assessed as wet will not be liable to pay cess in respect of voluntary user even, unless it was shown that such user was unauthorised and was of water from a source other than the one prescribed for the land.[7]

OBJECTIONS TO THE PRESENT BILL.—The present Bill is designed to change the law in regard to both these matters. There are however a number of considerations which it is hoped will be taken into account before the Bill becomes law.

It may be conceded that Government should possess power to distribute water fairly among all those entitled to it for purposes of cultivation, and therefore to punish people clandestinely abstracting water from a government source. But the Bill makes an altogether wrong approach to the problem. If owing to the negligence or default of the irrigation authorities or the acts of a ryot holding land on the upper reaches of a channel, water flows into the land

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STATEMENT OF OBJECTS AND REASONS.

The conservation and control of works of irrigation in India have from the earliest times been in the hands of the ruling power which has exercised its authority so as to secure a just and equitable distribution of the available supplies. For the purpose of such distribution it is generally recognized that the holders of registered wet lands have the first call on the supply available for irrigation and water is allowed to such wet lands for the irrigation of one crop or of two crops, according as they are registered as single crop wet or double crop wet. In order to make the best use of the supply in the interests of all holders of wet lands, it is often necessary to institute special turns during which the source of irrigation is open only for the use of specified portions of the ayacut and is closed to others. When available, water is also allowed on permits for the irrigation of dry lands and for raising a second crop on single crop wet lands. The taking of water for irrigation in cases other than those mentioned above or during periods when the irrigation work is closed is prohibited. It frequently happens, however, that ryots take water clandestinely to dry lands which are not entitled to water at all or to wet lands at periods during which such lands are not entitled to supply by making a breach in the channel bunds or by tampering with the sluices, etc. In order to prevent such unauthorized taking of water, it has hitherto been the practice to levy enhanced water-cess under the rules made in that behalf under the Madras Irrigation Cess Act, 1865 (Madras Act VII of 1865). Such enhanced water-cess has usually to be levied on all the lands actually irrigated by irregular means as it is seldom possible to identify the particular individual who is responsible for the irregularity. The High Court has however held in two recent cases—

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6. *Kanniappa Mudaliar* v. *Secretary of State,* (1935) 69 M.L.J. 728: I.L.R. 59 Mad. 107; *Secretary of State* v. *Veeranna,* (1937) 1 M.L.J. 732: I.L.R. (1937) Mad. 772 (F.B.).

7. *Ratnammal* v. *Secretary of State,* (1939) 2 M.L.J. 380.

of a ryot having land in its lower reaches without his knowledge one would reasonably expect the latter to make use of the water, if that can be done. Where is the sense then in mulcting him with a cess instead of appreciating his conduct, or in countenancing waste rather than allow the water to be used? What justification can there be for imposing cess in a case where a person's land has become waterlogged consequent on the action of some third person in tampering with a channel and the ryot is unable to get rid of the accumulation in spite of his best efforts and then to make the best of a bad situation he endeavours to raise a crop suitable to the then condition of his land and in fact does not make a profit out of it? *Venkatappayya* v. *The Collector of Kistna*,[8] was a similar case. In that case a ryot owned some lands in Zapudi village, which were originally cultivated with dry crops. The villages lying above Zapudi came to be irrigated with the waters of the Kistna canal. The excess water so flowing submerged the plaintiff's land and stagnating upon it rendered dry cultivation an impossibility. Nor could the plaintiff arrest the flow of the water except by putting up a dam at a high cost. In fasli 1294, the plaintiff sowed a kind of paddy called *tiruvarangam* and attempted to raise a crop which might not perish from the land getting periodically inundated. The crop in fact failed and yielded no profit. The revenue authorities levied a cess. The High Court held the

I.L R. (1937) Mad. 772 and I.L.R. 59 Mad. 107—that under the Madras Irrigation Cess Act as it now stands, water-cess can be levied only where the user of water is voluntary. It is, however, essential if Government are to discharge their responsibility for securing a just and equitable distribution of available supplies, that they should be armed with the power necessary to enforce the scheme of distribution laid down. It is therefore proposed to amend the wording of the Act so that the practice hitherto followed, as explained above, may be covered by express statutory provision.

2. The second proviso to section 1 of the Irrigation Cess Act runs as follows:—

"Provided also that no cess shall be leviable under this Act in respect of land held under ryotwari settlement which is classified and assessed as wet, unless the same be irrigated by using without due authority water from any source hereinbefore mentioned and such source is different from or in addition to that which has been assigned by the Revenue-authorities or adjudged by a competent Civil Court as the source of irrigation of such land."

Under this proviso, single crop wet lands are given water for one crop without any extra charge. The quantity of water available for irrigation is limited and it is not possible to supply water for a second crop to all *single* crop wet lands. The holders of registered double crop wet lands have a first call on water for the cultivation of a second crop and unauthorized use of such water by the holders of single crop wet lands will make it impossible for the Government to secure to the holders of registered double crop lands the supply to which they are entitled. Where therefore water is taken for irrigating a second crop on single crop wet lands without due authorization, the practice has always been to levy enhanced water-cess according to the

8. (1889) I.L.R. 12 Mad. 407.

imposition to be wholly illegal. In a case of that type under the present Bill the ryot will have to suffer.

In the statement of Objects and Reasons it is recited: "Such enhanced water cess has usually to be levied on all the lands actually irrigated by irregular means as it is seldom possible to identify the particular individual who is responsible for the irregularity." The Government has practically admitted that inability on its part to trace the culprits is responsible for the proposed punitive action against innocent persons as well. By what canon can such a course of action be justified in normal times?

The Bill gives power to Government to impose cess even where irrigation by involuntary user is only *partial*. This is a principle which appears now for the first time, and contains possibilities of easily becoming oppressive. Where the irrigation resulting from the involuntary user is not substantial there can be no justification whatever to impose any cess at all. Unless the involuntary user has resulted in the irrigation of lands completely or substantially he should not be made liable to any extent or at any rate to more than the cess lawfully leviable on the extent of the land benefited.

S 3 seeks to give a retrospective effect to the amendments. There is little warrant for providing any indemnity for acts done before the commencement of the amended Act. Where the prior law had been beset with doubt and had lent itself to more than one interpretation and the revenue authorities had followed a course of action, which subsequently turned out to be mistaken, there may be some justification for an indemnity clause. Where however the acts of the revenue authorities were not due to any ambiguity in the law and to any doubt legitimately engendered or

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rules framed under the Madras Irrigation Cess Act. In a recent judgment delivered in May last [(1939) 2 M.L J. 380] however, the High Court has held that the above proviso does not permit of the levy of water-cess for the irrigation of a second crop on single crop wet land, unless the water is taken from a source *physically different* from that allotted to the land. This ruling would invalidate the immemorial practice and enable any holder of single crop wet land to take water for a second crop from the source assigned to such land, without liability to any charge under the Madras Irrigation Cess Act. It is therefore essential to amend the wording of the proviso so that the existing practice may be covered by it.

3. As the High Court has held that the rules framed under section 1 of the Act are *ultra vires* in so far as they permit of the levy of enhanced water-cess in the cases mentioned above, it is proposed to give retrospective effect to the amendments made by the Bill and also specifically to indemnify the Government and their officers from liability in respect of acts done on the basis of the interpretation of section 1 which has been accepted and acted upon by the Government all these years.

It may be stated that the late Ministry shortly before its resignation approved of legislation on the lines proposed in the Bill.

where the language of the existing law is wholly clear and affords scanty shelter for the Courts adopted by the revenue authorities (as for instance, in collecting cess where water was not taken from an unauthorised source) there is no reason to give retrospective effect to the taxation and penal provisions and thereby relieve Government from the liability to refund cesses illegally levied in the past.

SUMMARY OF ENGLISH CASES.

MARSLAND, *In re* : LLOYDS BANK, LTD. *v.* MARSLAND, (1939) 1 Ch. 820.

Wills—Deed of separation—Covenant not to revoke a will—If extends to revocation of will by virtue of Wills Act, 1837, S. 18.

On 30th May, 1902, the testator and his first wife entered into a deed of separation. At that time the two children of the marriage were a son and daughter aged 12 and 7 years respectively. Immediately before the deed of separation the testator had made a will, whereby certain dispositions in favour of (1) the wife and (2) the children were made. The separation deed contained among others, a covenant "not to revoke or alter the will" so far as regards the gift to the wife and children. The first wife died on 14th November, 1908, and on some date before 19th February, 1935, the testator married a second wife and by virtue of the Wills Act, 1837, S. 18 the first will was revoked. On 19th February, 1935, he executed a fresh will. The question arose whether the covenant not to revoke was broken by the second marriage. Farwell, J., *held* that even assuming that the covenant was broken by the marriage of the testator, the covenant, if it restricted a subsequent marriage was void as being against public policy. The Court of Appeal *held* that when the testator covenanted not to revoke his will his words are to be confined to acts of revocation as such, and do not extend to the case under S. 18, Wills Act, 1837, where revocation follows as a matter of law whether or not the testator wishes it. It cannot be taken as an intention to impose a tacit restriction on remarriage.

GATTI *v.* SHOOSMITH, (1939) 1 Ch. 841.

Practice—Appeal not filed in time owing to mistake of legal adviser—Discretion of Court to extend time—R.S.C., O. 58, R. 15 *and O. 64, R. 7.*

The discretion to extend time for filing appeal, is a perfectly free one. The Court is not concerned with the merits of the case or probability of success or otherwise. Where the reason for the failure to institute his appeal in due time, was a mere misunderstanding (which to any one who was reading the rule without having the

authorities in mind, might very well have arisen) on the part of the legal advisers who had within time informed the respondents' solicitors by letter, of their client's intention to appeal and the delay is a matter of a few days, the discretion ought to be exercised and leave to appeal though out of time ought to be given.

BOND *v.* NORMAN. SAME *v.* NOTTINGHAM CORPORATION, (1939) 1 Ch. 847.

Easements—Collateral support—Corporation demolishing servient tenement in pursuance of clearance order—Duty to provide equivalent support.

The owner of a servient tenement adjoining plaintiff's premises having failed to demolish his premises as provided in a clearance order under Housing Act, 1936, it became the duty of the corporation to enter and demolish the premises.

Held, the corporation must be restrained from demolishing the premises without providing an equivalent support to the adjoining premises.

McEACHARN'S SETTLEMENT TRUSTS, *In re*: HOBSON *v.* McEACHARN, (1939) 1 Ch. 858.

Settlement—Power to invest in stocks—If gives power to invest in shares of a limited company.

A power to " invest in stocks " in a settlement includes the power to invest in fully paid shares of a company.

LOCK *v.* ABERCESTER, Ltd., (1939) 1 Ch. 861.

Easements—Right of way—Proof of user with carriages drawn by horses—If extends right to use of the way with mechanically propelled vehicles.

Where proof is given of a user over the required period by carriages drawn by horses, so as to establish a carriage way as an appurtenance, the right which is acquired is one which enables the owner of the property to which the road is an appurtenance to use the way with mechanically propelled vehicles.

DARBY, *In re* : RUSSELL *v.* MACGREGOR, (1939) 1 Ch. 905.

Wills—Residuary estate charged with payment of annuity under another will—Applicability of rule in Allhusen *v.* Whittell*—If payment to be made out of capital and income to the annuitant.*

The testatrix was in possession of her father's residuary estate subject to and charged with, the payment by her to the testator's widow an annual sum necessary to make the widow's income up to £3,000 per annum. She disposed of her whole estate including her father's residuary estate and added to her mother's income which

was to come out of the income of her estate. The testatrix settled her residuary estate. The question is whether or not, as between the life tenant and those interested in the capital of her estate, there ought to be, so far as regards the father's residuary estate, an adjustment as between capital and income as to the annuity in favour of the mother.

Held, the testatrix cannot be treated to have entered into a personal covenant to pay the annuity under her father's will. The rule in *Allhusen* v. *Whittell*, L.R. 4 Eq. 295 (that each instalment as it becomes payable is to be paid by means of a piece of capital together with the income on that piece of capital as from the date of testator's death to the date of payment) applies only to a liability to pay an annuity in respect of which the testator had entered into a personal covenant and not to a mere charge created by the original testator's will. In this case the payment, out of capital and income, cannot be made without the consent of the annuitant herself. The rule cannot be applied even after the annuitant's death as the rule has to be applied at the time of the payment.

DELGOFFE *v.* FADER, (1939) Ch. 922.

Gifts—Donatio mortis causa—*Delivery of Bank deposit book with other chattels—Effect.*

During her last illness the deceased on one occasion asked the donee to replace her black bag in her own wardrobe saying "If I should die, then you are to get everything in this bag—the jewellery and also what is in the envelope" (the envelope contained a deposit book of the Midland Bank with £ 933-8-0 to her credit). On a second occasion the deceased had the bag brought out and said "Put this bag in your wardrobe so that I can keep my eye on it; should I die, I wish you to have the bag and everything that is in it."

Held, on a second occasion, the handing of the bag with the direction to place it in the donee's wardrobe was a sufficient delivery and the bag with all the articles except the pass book passed under a valid *donatio mortis causa*. As to the pass book and the £ 933-8-0 standing to the credit of that account there is no valid *donatio mortis causa* by mere delivery of the pass book.

DE CHASSIRON, *In re*: LLOYDS BANK LTD. *v.* SHARPE, (1939) 1 Ch. 934.

Wills—Annuities to be paid out of income of residuary estate—Direction to resort to capital if income insufficient to pay the annuities—Annuities if to abate.

The testatrix after certain dispositions and legacies provided for annuities payable out of the income of the residue. The testatrix

directed that on the death of each and every one of the annuitants, trustees should pay the annuity of the person so dying equally between the surviving annuitants. She directed also that if at any time the income of the trust fund should be insufficient to answer the annuities, recourse may be had to the capital thereof. Any surplus of income was to be paid equally to certain charities. After the death of last of the annuitants, the capital and future income of the trust fund was to be distributed absolutely between some charities. The estate amounted to £ 23,000 and would provide annually £ 750 from authorised investments. The total of the annuities payable was £ 1650 per annum.

Held, as in the present case the testator's intention can be carried out exactly and fully there should be no valuation of the annuities and the directions given in the will should be carried out.

DAPONTE *v.* SCHUBERT AND ROY NOMINEES, LTD., (1939) 1 Ch. 958.

Practice—Charging order in favour of judgment-creditors—Enforceability if to be by foreclosure or sale.

In a summons for an order for foreclosure pursuant to a charging order on certain shares,

Held, following *Attwood* v. *Gibbons*, (1927) unreported and *D'Auvergone* v. *Cooper*, (1889) W.N. 256 that the remedy was sale and not foreclosure.

EVES : *In re* MIDLAND BANK *v.* EVES, (1939) 1 Ch. 969.

Will—Annuity free of all duties and free of income-tax at the current rate for the time being—Income-tax recovered by annuitant—Person entitled to.

An annuity " free of all duties and free of income-tax at the current rate for the time being " does not entitle the annuitant to retain the income-tax recovered on the annuity.

WALKER, *In re* : PUBLIC TRUSTEE *v.* WALKER, (1939) 1 Ch. 974.

Will—Annuity subject to forfeiture on bankruptcy—Bankruptcy of annuitant in lifetime of testator and discharge after death of testator but before instalment of annuity become payable—Effect on vesting of annuity.

Testator directed his executor and trustee under the will (dated December 28, 1931) to pay out of the income of his estate £ 250 per annum to his brother during life till *inter alia* he shall become bankrupt and on such event to the brother's children. Testator died on November 16, 1938 and will was proved on March 14, 1939. Testator's brother was adjudicated bankrupt on September 29, 1937 and obtained

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an order on November 15, 1938 suspending his discharge for one month and that he be discharged as from December 15, 1938.

Held, the annuity would have vested on the death of the testator but for the forfeiture clause. On the true construction of the will and in the events that have happened the annuity has failed and determined by reason of his bankruptcy subsisting at the death of the testator and the operation of the forfeiture clause transferred the annuity to the children of the annuitant.

GUNTHER'S WILL TRUSTS : *In re* ALEXANDER *v.* GUNTHER, (1939) 1 Ch. 985.

Will—Residuary estate—Date for valuation for adjustment of rights inter se *in the final distribution.*

Where there is nothing in a will which indicates that the testator contemplated any particular date for the valuation of the estate for adjustment of rights in the final distribution, the date of the death of the testator must be taken as the most convenient date for such valuation.

BROOKS SETTLEMENT TRUSTS : *In re* LLOYDS BANK LTD. *v.* TILLARD, (1939) 1 Ch. 993.

Assignment by son of an expectancy under powers under Marriage settlement of parents—Assignment voluntary and not for value—If enforceable in equity.

By a voluntary settlement of 8th May, 1929 A.J.T. assigned to the plaintiff bank all his interest to which he may thereafter become entitled under a special power of appointment under the marriage settlement of the parents of 14th November 1904. On 15th May, 1939 the mother in the exercise of the power under 1904 settlement irrevocably appointed a sum of £ 3517 to A.J.T. and also released her life interest in it. A.J.T. claimed this sum notwithstanding the settlement of 1929.

Held the assignment of 1929 was of something which he may become entitled to in future—not a contingent interest, but a mere expectancy. The trustees must hand over to A.J.T. the sum of £3517 on the footing that the voluntary settlement did not operate as a valid assignment or declaration of trust in respect thereof.

EAVES *v.* EAVES, (1939) 1 Ch. 1000.

Will—Gift to wife during widowhood—Remarriage of widow decreed a nullity—Effect.

The testator gave his wife a legacy and gave to her during her widowhood the use of a certain house and an annuity of £ 600 during her life or widowhood to be paid by the trustees. The testator died

in 1919 and his widow remarried in 1925. A decree *nisi* of nullity of that marriage was made on 24th May, 1937, and that decree was made absolute on 15th November, 1937, on the ground of incapacity of the husband to consummate the marriage. She then claimed the life interest as widow.

Held, as the second marriage was null and void *ab initio* her widowhood never determined. But she could not after such long delay claim the benefits of any life interest from the trustees who had disbursed them.

[Affirmed by Court of Appeal in (1939) 4 All. E. R. 260 on the ground of acquiescence].

BATCHELOR *v.* EVANS, (1939) 1 Ch. 1007.

Executors—Judgment by default against—Presumption of devastavit *—If open to executors to prove there was no* devastavit *and assets of deceased no longer in their hands.*

In the King's Bench in an action by the plaintiffs on a mortgage by the deceased, a judgment by default was passed against the executors in their representative capacity. The result was that the defendants admitted by not putting in an appearance that they had in their hands assets of the deceased sufficient to satisfy the claim. Shortly after the judgment proceedings in Chancery Division was commenced by two beneficiaries for administration of the estate of the deceased with the executors as defendants and in that action a receiver of the estate was appointed and an order for administration was made, on default of appearance by defendants. Some months later, the plaintiff issued a *writ of fieri facias* to enforce the judgment and a return of *nulla bona* was made. In the present action, plaintiff claimed payment by defendants personally of about £ 2,000 under the mortgage.

Held, though there is no doubt that the King's Bench judgment is conclusive against the defendants so far as it goes, as an admission of assets, and the return of *nulla bona* by the sheriff raises a presumption that a *devastavit* has been committed by the defendants, it is open to the defendants, if they can, to show why at the date of the return of *nulla bona* the assets admittedly in their hands at the date of the judgment, are no longer in their hands and to show, that that is not due to any *devastavit* by them. The appointment of receiver and order for administration is conclusive proof of that.

SMITHERS : *In re* WATTS *v.* SMITHERS AND OTHERS, (1939) 1 Ch. 1015.

Will—Construction—" My securities " and remainder of the money.

A will contained the bequest " I give and bequeath to my son *B* when *my securities* have been converted into cash, two-thirds of the

proceeds. To my son *H* £500. To my son *B* the *remainder* of the money.

Held, the expression " my securities " in the absence of sufficient contest cannot have a wider meaning than a debt or claim the payment of which is in some way secured, and does not include shares or stock in a company. The gift of the remainder of the money is a gift of the residuary personal estate.

KLEINWORT SONS & CO. *v.* UNGARISHE BAUMWOLLE INDUSTRIE ACTIENGESELLSCHAFT, (1939) 2 K.B. 678 (C.A.)

Contract—Supervenient foreign legislation—Effect on enforceability.

Where there is an offer by letter from Hungary accepted in London of bills payable in London and it obliges the defendant to provide pounds sterling in London, London is both the *locus contractus* and the *locus solutionis.* Two elements must co-exist if an English contract rendered unenforceable in the English Court by supervenient foreign legislation—(1) there must be an act which the contract requires to be performed in the foreign country, and (2) the act must have been rendered unlawful there. In the present contract nothing is said as to whence the pounds sterling for payment in London are to come and there is no impossibility of performance. The plaintiff is entitled to succeed. (Decision of Branson, J. affirmed by the Court of Appeal.)

EGERTON *v.* JONES, (1939) 2 K.B. 702.

Lease—Relief against forfeiture—Grant to mortgagees of lease—Terms on which relief granted—Right of lessor to full indemnity for all costs and expenses.

The mortgagees of a lease applied for relief against forfeiture against the lessee which the lessor himself had applied and failed to obtain relief even in the Court of appeal. The mortgagees contended that they ought to have been made parties or notice given to them of the earlier proceedings both by lessor and lessee.

Held, the mortgagees need not have been made parties to earlier proceedings and there was no obligation to give them notice. The mortgagees ought to have relief against forfeiture on terms of fully indemnifying the plaintiffs against all costs incurred by them as between solicitor and client subject to the lessors transferring to them any decree for costs they may have against the lessees.

GAUMONT BRITISH DISTRIBUTORS *v.* HENRY, (1939) 2 K.B. 711.

Dramatic and Musical Performers Protection Act, 1925 (c. 46), S. 1 (a)—" Knowingly making any record without the consent in writing of the performers "—Gist of offence.

The respondent was a member who was playing in a band in a dance hall. The appellants having obtained the permission of the proprietors of the dance hall and the producer of the dance made a "talkie" which was afterwards shown in a newsreel. It was found that the appellants were free from knowledge of the absence of consent of the individual performers and it could not be said that the appellants knowingly made the record without the consent of the respondent.

Held, construing S. 1 (*a*) of the Act of 1925, it was only when what was done was done knowingly and also without consent that an offence was committed.

LONDON AND PROVINCIAL LEATHER PROCESSES LTD. *v.* HUDSON, (1939) 2 K.B. 724.

Insurance of Goods against "All risks"—Inability to recover skins handed over for dressing owing to bankruptcy of the person employed—If "fortuitous or accidental loss or" casualty, covered by the insurance.

Plaintiffs had insured their goods (skins) against all and every risk, whatsoever, however arising. Popper, a firm of Berlin employed by plaintiffs to dress their skins, had entrusted the work to sub-contractors who claimed to exercise a lien on them for obtaining payment from the firm of Popper and later Popper became bankrupt. The skins were not recovered by plaintiffs who intimated to the under-writers who made no attempt to take proceedings in Germany. On the claim on the insurance,

Held, there has been loss due to a "fortuitous circumstance accident or casualty" under the policy and plaintiffs are entitled to judgment.

INLAND REVENUE COMMISSIONERS *v.* FRED'S SECURITIES CO., (1939) 2 K.B. 734.

Income-tax—Finance Act, (1937), S. 14 (3)—Investment Company—Apportionment of undistributed income among the share-holders.

The capital of an investment company was divided into 18 *A* ordinary shares of £ 100 each, 400 *B* ordinary shares of 10 sh. each and 980 half per cent. preference shares of £ 100 each. *A* and *B* ordinary sharers were entitled to share equally in any dividend after a small dividend paid upon the preference shares. *A*, *B* ordinary sharers were entitled to be repaid the nominal value of their shares *pari passu* on a winding up. Thereafter the *B* ordinary shares were to be paid £ 400 per share. Then the preference share-holders were entitled to be repaid the nominal amount of their shares and thereafter the *B* ordinary shares were entitled to any surplus assets remaining.

In 1936—37 the income from investments of the company was £ 1284 and the value of the assets was assumed to be £71322 . It was found that *A* shares would have got on a winding up £ 900 and *B* shares would have got the remainder and preference shareholders nothing as the assets were insufficient.

Held, a proportion of $\frac{900}{71322}$ of £ 1284 should be apportioned to *A* shareholders and the balance to *B* shareholders.

BURFITT *v.* A. & E. KILLE, (1939) 2 K.B. 743.

Negligence—Sale of pistol dangerous in itself to boy under 12—Injury to plaintiff, another infant—Liability for damages.

The sale of a pistol and ammunition to a boy under 12 years constituted something dangerous in themselves and which as to the ammunition was a sale forbidden by law. Where another child injures itself while playing with a pistol, the defendants who sold the pistol are liable for the damages.

KING *v.* MICHAEL FARADAY AND PARTNERS, LTD., (1939) 2 K.B. 753.

Contract—Frustration—Contract to pay £1000 yearly charged on salary—Reduction of salary to £1000 yearly—Effect—Contract if contrary to public policy.

In satisfaction of a decree the debtor who was earning a salary of £ 1000 per annum absolutely assigned an insurance policy which had a surrender value and also agreed to pay yearly £ 1000 in equal monthly instalments for ten years (out of which the decree-holder was to pay the premiums on the policy) and charged the amount on his then pay and remuneration of £ 3,000 per annum. In case of default in carrying out any of the provisions, the decree was to be executable for the balance after giving credit to the surrender value of the policy on the date of the assignment less the sums owing for loans thereon. An irrevocable authority was given by the debtor to his employers (the company) authorising them to pay the assignee out of his salary the £ 1000 yearly for ten years. The payments were made until February 14, 1938, for five years and on default the action was commenced for payments due under the agreement. The salary was reduced to £ 1,000 per annum since May 6, 1938 and a receiving order was made on March 18, 1938, on an act of bankruptcy committed on February 1938. The decree-holder proved in the bankruptcy without valuing the security. The debtor claimed his salary as personal earnings necessary for the maintenance of himself, his wife and family.

Held, an assignment of after-acquired property is effective, not merely against the debtor but also against his trustee in bankruptcy. The debtor can before bankruptcy charge his personal earnings over and above what is required for the maintenance of himself and his family so as to give a good title against his trustee. The reduction in salary was a change in an essential condition, the continuation of which must have been contemplated as the basis of the obligation. The obligation, in the circumstances had become one which would be contrary to public policy to enforce. And by proving in the bankruptcy the security must be deemed to have been surrendered.

SUNLEY & CO. *v.* CUNARD WHITE STAR LTD., (1939) 2 K.B. 791.

Damages—Contract—Agreement to transport plaintiffs' tractor and scraper to workspot by a named steamship and for some portion by land—Delay in the transport by the ship owing to difficulty in land transport to reach ship—Measure of damages for loss to plaintiff of use of machinery—Tests.

Where defendants undertook to transport certain tractors and scrapers to the workspot of the plaintiffs —(contractors)—by a named ship and owing to difficulty in transporting the machinery by land to the ship, the machinery were transported only by the next ship, and the plaintiffs claimed damages for the loss of the use of the machinery by the delay.

(After discussing the rules for assessment of damages in torts and contracts and examining the case law) : *Held*, the plaintiffs can recover the true value to them, as best as the Court as a jury can ascertain, of the use of the machinery as it would have been used in the workspot during the period of delay in question. The fact of the rarity of such machinery and impossibility of mitigating damages by hiring other machinery has also a bearing as also the knowledge of the defendants of the purpose for which the machinery were required.

LUCAS *v.* POSTMASTER-GENERAL, (1939) 2 K.B. 808.

Workmen's Compensation—Employee sustaining injury while attending a gymnasium class as required by the conditions of employment—If accident arising out of and in the course of employment.

The appellant who was employed to repair telephone apparatus, while attending a gymnasium class after office hours in pursuance of the conditions of employment, fell down and sustained injuries. In a claim for compensation,

Held, the accident did not arise out of and in the course of his employment.

WHITE *v.* J. & F. STONE LTD., (1939) 2 K.B. 827.

Tort—Defamation—Slander—Statement to plaintiff overheard by co-employees—If privileged.

The whole essence of liability for libel or slander is the publication of the defamatory statement to some third person, not the use of language of a defamatory kind to a person complaining of it. The privileged occasion must arise because the publication of the statement in question is made to a person to whom the speaker has a duty or interest to receive it. So where the publication complained of is overhearing of statement to plaintiff by his co-employees there is no privileged occasion.

WILSON *v.* MITCHELL, (1939) 2 K.B. 869.

Guarantee—Joint sureties—Claim for contribution—Counter-claim for damages available to principal —If a defence against claim for contribution.

B & Co. supplied a Fordson tractor to the M.F.I. who hired it to Mitchell & Co. The plaintiff and defendant jointly guaranteed payment and performance by the hirer of his obligations under the hire purchase agreement. The M.F.I. assigned the contract to B & Co. who sued purely on the hire purchase agreement. A defence was put in by the present defendant in which in effect he set up a counter-claim for breach of warranty, etc. But the present plaintiff submitted to a judgment and paid the money. The present suit was for contribution to which the defence set up was that there was a counter-claim or a cross-claim which was available to the principal.

Held, the only cross-claim was a claim for damages and it could not be prayed in aid by a surety as against the claim on the guarantee. Even if it could be prayed in aid by the surety it could not be prayed in aid without bringing in the principal whose claim it really was.

INLAND REVENUE COMMISSIONERS *v.* MARBOB, LTD., (1939) 2 K.B. 872.

Income-tax—Companies—Dividend paid to a share-holder by cheque (when no funds in company to meet it) repaid as loan to company—If undistributed income of the company.

Two companies were formed for the sole purpose of reducing the liability for surtax of one Lucas. The capital of one company was £ 100 in £ 1 shares of which 2 shares were held by Lucas and 98 shares by the other company. The only asset of the company was an annuity of £ 12,000 per annum which Lucas covenanted to pay for 7 years or for the rest of his life in consideration of the issued debentures to him of the value of £ 57,300. With the 1st instalment of the annuity of £9,300 the company redeemed some of the debentures held by Lucas for £ 9,300 so that the company had no funds available,

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When the 2nd instalment of the annuity was paid, a dividend of £ 166 per share free of tax was declared and a cheque was issued in favour of the company holding the 98 shares. In pursuance of a resolution by that company the same day the cheque was re-endorsed to the company which issued it.

Held, the condition as to repayment as a loan of the amount of the dividend negatives the idea of a genuine distribution of income. Alternatively if the condition attached to the drawing and handing over of the cheque, it was not distribution in such manner as to render the amount distributed liable to be included for the purposes of surtax of the members but was in reality a capitalisation of the sum alleged to have been distributed.

GIBBONS *v.* WESTMINSTER BANK, LTD., (1939) 2 K.B. 882.

Banker and customer—Dishonour of cheque owing to mistake—If "non-trader" customer entitled to anything more than nominal damages without pleading and proof of special damages.

In an action against her bank for dishonouring a cheque of hers when her account was in funds, the plaintiff, a non-trader, did not plead any special damage but proved that after the dishonouring of her cheque, her landlord insisted on her paying the rent in cash.

Held, a person who is not a trader is not entitled to recover substantial damages unless the damages are alleged and proved as special damages and pleadings should not be allowed to be amended at a late stage.

MOSS' EMPIRES, LTD. *v.* OLYMPIA (LIVERPOOL), LTD. AND ANOTHER, 1939 A.C. 544.

Landlord and Tenant—Covenant by lessee to spend £ 500 per annum on repairs or pay difference between £500 and actual expenses of repairs—Failure to pay—Right of landlord.

Lessees covenanted to spend £ 500 per annum on repairs or to pay the lessors the difference between the sum and the actual expense. The lessee did not spend. In a claim by the lessor for the amount.

Held (1) the amount was payable as a debt and not as damages for breach of covenant to repair. (2) The covenant ran with the land and was binding upon the assignees. (3) The amount payable was not a penalty.

REARDON SMITH LINE, LTD. *v.* BLACK SEA AND BALTIC GENERAL INSURANCE CO., LTD., 1939 A.C. 562.

Insurance—Shipping—Charter of ship to proceed with all convenient speed to a certain port—Ship taking usual route—If "deviation"—Evidence as to usual route—Admissibility.

The respondent an insurance company was sued under the guarantee which it gave to the appellant at the request of the charterer to pay any contribution in general average, salvage or special charges due in respect of the cargo and to admit a loss of freight in general average so far as the same might be held to be properly due and payable by the charterer. The appellants contended that their calling for bunkers at certain port was not a deviation or departure from the contract voyage because the vessel was pursuing a usual and reasonable commercial route.

Held, it was permissible to adduce evidence to establish what was the usual route and on the facts there was no deviation from the contract voyage.

MONTREAL TRUST CO. *v.* CANADIAN NATIONAL RAILWAY CO., 1939 A.C. 613.

Contract—Railway Company—Prohibition of contract in which director was directly or indirectly interested—Director's nominee leasing to company and director indemnifying lessor who was to account to director—Lease if void.

The Railway Act, S. 121, provided that "No person who is a director of the company shall enter into, or be directly or indirectly, for his own use and benefit, interested in any contract with the company other than a contract which relates to the purchase of land necessary for the railways, nor shall any such person be or become a partner of or surety of any contractor of the company. Where *S* (the lessor) was admittedly and to the knowledge of the Railway Company (the lessee) merely the nominee of *D*, a director of the company who indemnified *S* in respect of all liability as lessor, and *S* was to account for all the receipts to *D*,

Held, D was indirectly interested in the lease and the contract was void and the rent irrecoverable.

WILLIAMS *v.* WILLAIMS, 1939 P. 365.

Divorce—Desertion—Insanity of deserting spouse—Effect on desertion.

In May, 1933, the respondent deserted his wife. On 26th June, 1934, the respondent was certified under the Lunacy Act and put under restraint. The present proceeding for divorce based on desertion was started on 21st January, 1938.

Held, the Act of desertion requires two elements on the side of the deserting spouse, *viz.*, factum of separation and the *animus deserendi*; and on the side of the deserted spouse the absence of consent. In the case of a person of unsound mind there is no capacity to have the necessary *animus* to give it the quality of volition required to produce a legal result.

ETTENFIELD *v.* ETTENFIELD, 1939 P. 377.

Husband and Wife—Separation without deed—Evidence of non-access—Admissibility.

As it is right to allow evidence of non-access in cases where the parties are living apart under a deed of separation it is also right to admit such evidence though that agreement has not taken the form of a deed.

CHIPCHASE *v.* CHIPCHASE, 1939 P. 391.

Husband and Wife—Second marriage of woman in her maiden name (with banns published in that name) when first husband not heard of for more than 7 years—Presumption of death of first husband—Effect on validity of such marriage.

A woman whose previous husband had not been heard of for more than 7 years having married a second husband, started proceedings against him for adultery, desertion and failure to maintain her. The second marriage took place in her maiden name and the banns were published in that name.

Held, (1) Law presumes a person who has not been heard of for over 7 years to be dead. Once it is shown that the wife has not heard of her husband for 7 years that presumption arises though it is rebuttable. The person relying on such presumption must prove reasonable inquiries. (2) There must be an element of intentional concealment of identity in having the banns published in the maiden name before it can be said that the marriage is void for undue publication of banns and the wife must be given an opportunity of establishing that the name in which she was married was the name by which for years she had been commonly known and that there was no intention to conceal her identity.

MILBANK *v.* MILBANK, 1939 P. 401.

Divorce—Desertion—Pendency of a collusive petition by respondent for dissolution—If petitioner can assert that wife was deserting without cause during such pendency.

A wife's previous petition for dissolution on the ground of the husband's adultery was dismissed as collusive. The present petition was by the husband for divorce on the ground of his wife's desertion for 3 years immediately preceding the presentation of the petition.

Held, it is impossible in law to allow the husband to say that the 12 months during which the collusive petition was being actively prosecuted, was a period during which his wife was deserting him without cause.

KELNER *v.* KELNER, 1939 P. 411.

Divorce—Gift of money in contemplation of marriage by wife's father to husband and wife jointly—Dissolution of marriage—Rights of the spouses to the money.

The wife's father provided a dowry of £ 1000. The money was placed in an account in the joint names of the father, the daughter and the prospective son-in-law and the arrangement was that it should become the property of the daughter and son-in-law on the marriage taking place. The marriage took place and the father withdrew his name. After 5 years there was a decree for dissolution and the wife claimed the whole of the balance of the fund on the authority of *Joseph* v. *Joseph*, (1909) P. 217.

Held, (1909) P. 217 is a case of annulment of marriage where the purpose for which the money was provided had failed *ab initio*. Here the gift was to husband and wife jointly and each is entitled to half the amount.

ASTLE *v.* ASTLE, 1939 P. 415.

Divorce—Cruelty—Unsound mind of respondent—How far a defence—Test for responsibility for acts of cruelty.

Whether the cruelty sought to be made a ground of divorce is sufficient to entitle the wife to a decree or not depends on whether or not by reason of his mental state the husband appreciated the nature and quality of such acts of cruelty.

JOTTINGS AND CUTTINGS.

The New Despotism.—Lord Hewart has made us familiar with the New Despotism which attempts to substitute Administrative Justice for the more familiar and more welcome justice of the Courts. But that fades into insignificance when compared with the New Despotism of the Bureaucracy which has sprung up since the war. It appears that the Government are still oblivious of the widespread damage which has been caused by the wholesale requisitioning of hotels and schools, and in a reply given on behalf of the Chancellor of the Exchequer in the House of Commons last week, it was stated that no action will be taken until the working of the Compensation Act has been tested. But the working of that Act will be limited by its terms, and these do not allow of the compensation for loss to be assessed by a jury, which was the subject's right before the recent hurried Emergency Legislation. In other directions the regulations devised to meet war requirements show a singular lack of appreciation of the real

situation. The lightning regulations are quite impossible of observance for any length of time. In their present stringency they should never have been drafted, and to meet a risk which, though no doubt substantial, has not materialised, and actual and probably still greater danger has been created in the largely increased slaughter on the roads. There has been similar lack of proportion in the wholesale taking of doctors, both general practitioners and specialists, from their proper work. Actual needs are left unattended to while doctors are waiting at hospitals which are empty, and which, if there is any wisdom and prudence in statesmanship, will remain so. Nor does bureaucratic control stop here.—*L.J.*, *1939*, *p. 245*.

Masters in Chancery.—At the outset of these notes it should be made so clear that even he who runneth may read, that the Masters in Chancery, to whose history reference will be made, are not to be confused with the officials now attached to the Chancery Division whom we know as Chancery Masters, but who, till some years ago, bore the less imposing title of Chief Clerks. The old Masters in Chancery dated from a very early period of our legal history, and were abolished in 1852 by the statute 15 and 16 vict. c. 80. Though they were in existence considerably earlier than the reign of Queen Elizabeth they seemed to have then attained great prominence during the Chancellorship of Sir Christopher Hatton, of whom it was said that he was very cautious, "not venturing to wade beyond the shallow margin of equity where he could distinctly see the bottom. He always took time to consider his judgments and it was said that he was guided by Sir Richard Swale one of the Masters in Chancery, and so got on fairly satisfactorily." At that date the Masters were described as "grave and wise men, though many of them are of another profession and are not employed in framing of writs as at the first, yet they do sit upon the bench with the Chancellor; and taking advantage of their opportunities and leisure, refer matters which have depended in that court ready for hearing, unto their examinations, which upon their certificates, are decreed accordingly ....but the people do much complain of the new employment of them."—*L.T.*, *1939*, *p. 276*.

Induction of a Master.—Richard Swale, referred to in the preceding paragraph was formally inducted into his office in 1587, the ceremony being thus described in a contemporary record: "This present day Richard Swale, Gentleman, Doctor of the Civil Law, was placed as a Master of the Chancery in ordinary in the room of Doctor Barkely deceased, by the Right Honourable Sir Christopher Hatton, Knight, Lord Chancellor of England; and his Lordship did put on the said Mr. Swale's cap." It is curious to find that this formality of con-

ferring the office by the use of a hat or cap continued down to Lord Brougham's Chancellorship, so persistent are old customs many of which have lost all their original significance.—*L.T., 1939, p. 276.*

Sale of the Office.—In the early days a pernicious system prevailed whereby prospective Masters were expected, nay forced, to pay large sums for their appointment; a system upon which a lurid light was cast during the trial of Lord Chancellor Macclesfield for corruption. As the learned Foss said, Macclesfield had not been content with what had been the accustomed honorarium but had increased the price so enormously that it became next to impossible for the appointees to refund themselves without either extorting unnecessary fees by delaying causes before them, or using the money deposited with them to defray the sum demanded. At that time, however, the price paid for the Master's places was considered a legitimate part of the profit of the Chancellor, and this received a singular confirmation in the grant to Lord Macclesfield's successor, Lord King of a considerable addition to his salary as compensation for the loss occasioned by the annihilation of the practice consequent upon Lord Macclesfield's trial.—*L.T., 1939, p. 276.*

Jekyll as Master.—Joseph Jekyll, a descendant of Sir Joseph Jekyll, who had been Master of the Rolls in the early years of the eighteenth century, was a prime favourite with the Prince of Wales, afterwards King George IV, and being envious of a comfortable post like that of Master in Chancery, secured the influence of his royal friend to back his claims with Lord Eldon, the then Lord Chancellor. Eldon himself told the story of how at first he refused to make the appointment, on account, as he said of Jekyll being totally unqualified for the duties of the office. The Prince was, however, insistent and at last threw himself back in his chair at the Chancellor's house, and exclaimed, "How I do pity Lady Eldon." "Good God," said Eldon "what is the matter?" "Oh, nothing" replied the Prince, "except that she never will see you again, for here I remain until you promise to make Jekyll a Master in Chancery." Upon this Eldon capitulated and the appointment was duly made, and apparently the new Master discharged the duty quite efficiently. Some one asked Jekyll how in the world he came to be picked out for the office, to be told by the happy office-holder, that it was because he was the most unfit man for the post! Jekyll continued in office for a considerable time, till indisposition and age compelled him to relinquish the work. Happening to meet the Chancellor the day after his retirement he accosted him thus in his jocular way: "Yesterday, Lord Chancellor, I was your Master, to-day I am my own master!" *L.T., 1939, p. 276.*

Another Master of Humour.—Of a later Master in Chancery an amusing story has come down to us, demonstrating once again that the daily round and common task in their office could not quench their sense of humour. It appears that a dispute had arisen between two adjoining landed proprietors regarding *inter alia*, rights of fishing in a stream. One of the proprietors was a wealthy man, his neighbour a poor man. The dispute they agreed should be determined by arbitration and a certain Master in Chancery was selected to act as arbitrator. It was further agreed that the Master should give two days to the task, and, further, that on the first day he should walk over the relatively poor man's estate, hear his uncontradicted version, and should dine with the two proprietors at his, the poor man's table, and thereafter should do the like at the other proprietor's table. At the close of the first day the dinner was modest, but sufficient consisting of three fried soles, a roast leg of mutton, three pancakes, three pieces of cheese, three pieces of bread, ale, and a bottle of sherry, this menu being followed by three fine apples. At the close of the second day's perambulation the trio dined at the rich man's table, and it appeared, being struck by the simplicity of the previous day's dinner, resolved to provide an exact replica of the dishes then served; that is the three soles, roast leg of mutton, three pancakes, three pieces of cheese, three pieces of bread, ale, and a bottle of sherry, followed by three apples. The second dinner finished, the Master in Chancery introduced his award in these words: "Gentleman, I have with all proper attention considered your *sole* reasons; I have taken due notice of your *joint* reasons; and I have come to the conclusion that your *des* (*s*) *erts* are about *equal*!"—*L.T.*, *1939*, *p. 276*.

Knight Bruce before a Master in Chancery.—The late Augustine Birrell, whose charm as an essayist is firmly established, had, for members of the legal profession, a special interest by reason of the frequency of his illustrations drawn from their studies and practice. Sometimes these are introduced with much humour and in curious collocations. Readers of his essay on Milton may recall how in discussing the poet's effort to "justify the ways of God to man" he said that while it might be well and pious enough, to represent God as doing so by argumentative process was not so well, and was to expose the Almighty to possible rebuff. Following this comes an interesting anecdote about Knight Bruce, later a distinguished Lord Justice, who, when at the very head of the profession, was taken in before a Master in Chancery and found himself pitted against a little slip of an attorney's clerk, scarce bigger than the table, who, nothing daunted, and by the aid of authorities cited from a bundle of books as big as himself, succeeded in worsting Knight Bruce, whom he persisted in calling "my learned friend." Knight Bruce, we are told, treated

the imp with that courtesy which is always an opponent's due, " but he never went before the Masters any more."—*L. T., 1939, p. 277.*

Lay Judges in Court.—Quite apart from the courts of quarter sessions in which lay justices exercise judicial functions, there have been instances in which a layman has had to " assist " in the hearing of appeals in the most august tribunal of the land, to wit, the House of Lords. Before the reconstitution of the House as a judicial body by the appointment of Lords of Appeal in Ordinary, it was not uncommon for the Lord Chancellor to be the sole judge, but, of course, it was essential that a quorum of peers should be present, and now and again a lay peer would be commandeered to enact this role. Comparatively late in the nineteenth century, the then Duke of Buccleuch was in this capacity brought into the House to " assist " in the hearing of an appeal which lasted three days, at the end of which his Grace was intensely bored and said as much to the Lord Chancellor; but the only consolation he received was the assurance that the litigants would much rather have their disputes settled by a Great Scottish nobleman than by mere lawyers, and with this he had perforce to be content. Now, of course, with the number of Law Lords available, there is no difficulty in constituting a quorum without the necessity of impressing the attendance of a lay peer.—*L.T., 1939, p. 306.*

Dr. Edward Jenks.—Dr. Edward Jenks, Emeritus Professor of English Law, and late Dean of the Faculty of Laws in the University of London, died at Bishops Tawton, Devon, on Friday, 10th November at the age of seventy-eight. He was educated at Dulwich and King's College, Cambridge, and was called to the Bar by the Middle Temple in 1887. He wrote numerous books on law and politics, and perhaps the best known are his "Short History of English Law," and " Law and Politics in the Middle Ages." He will also be remembered for the success he achieved in inaugurating a new system of legal education for The Law Society, of which he was Director of legal studies from 1903 to 1924.—*S.J., 1939, p. 872.*

The Great Seal.—Readers of that veracious history which tells of the adventures and misadventures of the late Mr. Samuel Pickwick may recall that Mr. Solomon Pell, when in a reminiscent mood, regaled his hearers with many interesting anecdotes of the Lord Chancellor with whom he professed to be on close terms of friendship, and in particular he recalled how on one memorable occasion he was dining with that exalted functionary, they two alone, where everything was as splendid as if twenty people had been expected, and " the great seal was on a dumb waiter at his right hand, and a man in a bagwig and suit of armour

guarding the mace with a drawn sword and silk stockings—which is perpetually done, gentlemen, night and day." This description, which undoubtedly showed that Mr. Pell with his many other gifts, possessed that of imaginative powers of no mean order, cannot however, it has to be admitted, be regarded as in accordance with literal accuracy; but on the other hand it is a remarkable instance of the precocity of the youthful Dickens who could so effectively make delightful play with such an august emblem of authority.—*L.T., 1939 p. 321.*

The Damasked Seal.—In early days it seems that when the Great Seal was discarded on a new Seal being brought into use it was what was technically termed "damasked," that is, gently tapped with a hammer and thus was supposed to be deprived of its virtue. Apparently for long it has been the rule or custom that when the Seal has thus been treated it becomes the private perquisite of the holder of the office of Lord Chancellor, and there are stories how the better half of the holder of that high judicial post has, with wifelike economy, had the august symbol turned into something more practical, such as a tray or something similar. Occasionally it has happened that a dispute, amicable it is true, has arisen as to the rightful possession of the discarded Seal. Thus there was a keen contest between Lord Lyndhurst and Lord Brougham as to their respective rights to the Great Seal in use in the reign of George IV. It happened on this wise: On William IV's accession a new Seal was ordered to be made, Lyndhurst being then Lord Chancellor, but before the new Seal had been made, Brougham succeeded to the office of Lord Chancellor, and the question then arose to which of these two eminent lawyers the old Seal, then damasked, was to fall. Lyndhurst advanced his claim to it, on the ground that, as the order for the new Seal was made during his tenure of office, the Seal was actually discarded during his Chancellorship, and therefore it fell to him. Brougham, on the other hand, maintained that the order for the new Seal was but a step prudently taken in anticipation of the act by which George IV's Seal was destroyed, and that while the order was being executed by the engraver the Seal of his late Majesty George IV, was in fact as well as in theory the Seal of William IV, till he damasked it, at which time he, Lord Brougham, was its holder. A vigorous examination of precedents and a keen discussion followed and was still waging when William IV, terminated it by a decision which, as someone said, was directly in defiance of principle, precedent and law, namely, by adjudging the one half of the Seal to each of the contestants, and in order probably to make the decision still more acceptable to each, the King directed that each part should at his own royal cost be set in a rich silver salver.—*L.T., 1939, p. 321.*

Eldon and Brougham.—When Eldon, who held the office of Lord Chancellor for so many years, looked out upon the World, behold only those belonging to the Tory fold were good, and this attitude manifested itself conspicuously in his refusal, on account of their political faith, to give either Brougham or Denman the silk gowns which professionally they had so well earned. "In nothing," said one writer who touched on this subject "did the spitefulness of Lord Eldon's essentially ungenerous nature display itself more offensively than in the determination which he showed to injure the professional status and prospects of lawyers who ventured to oppose his political views," and so long as Eldon held the Seal neither Brougham nor Denman, who had worn silk gowns as Queen Caroline's Attorney-General and Solicitor-General, but had been reduced to stuff on that lady's death, was raised to the status of King's Counsel, although in the very front rank of the Bar. As was said, Eldon, could not control his hatred for those who had been true to their client and to Whig principles. "No young lady," wrote Eldon, "was ever so unforgiving for being refused a silk gown, when silk gowns adorned female forms, as Brougham is with me, because having insulted my master, the insulted don't like to clothe him with distinction, and honour and silk." Some few years later, it is good to remember, both Brougham and Denman received the desired promotion in professional rank.—*L.T., 1939, p. 321.*

Vicissitudes of the Great Seal.—Like less august symbols, the Great Seal has in the course of history experienced not a few vicissitudes imperilling for a time at least the orthodox order of business of the State. We read, for example, that to prevent it reaching the Prince of Orange, later King William III, it was thrown into the Thames, but later was found in the net of a fisherman near Lambeth and delivered to the Lords of the Council. In March, 1784, the Seal being then in the custody of Thurlow, the Lord Chancellor, it was stolen from his house in Great Ormond Street, along with some other valuables. On discovering what had happened, Thurlow saw Pitt and the two saw the King and communicated to him the theft of the Seal. A Council was at once called at which an order was made that "his Chief Engraver of Seals do immediately prepare a Great Seal of Great Britain," which was to show certain alterations, including "that on the reverse, where His Majesty is sitting in state, the palm branch and the cornucopia be omitted on the sides of the arms at the top, and over and above arms the number of the present year 1784 in figures be inserted, and at the bottom also the present year MDCCLXXXIIII in Roman figures." Another curious alteration directed to be made was stated thus: "The herbage under the horse's hind legs be omitted." This new Seal was prepared with

extraordinary expedition and was actually finished in a rough fashion on the following date.—*L.T. 1939., p. 322.*

BOOK REVIEWS.

THE LAW AND PRACTICE OF INCOME-TAX IN INDIA by Messrs. S. C. Manchanda, M.A. (Cantab.), Advocate, High Court, Lahore and S. K. Aiyar, B.A., B.L., Advocate, High Court, Madras. Published by The University Book Agency, Kacheri Road, Lahore. Price Rs. 10.

It is with pleasure that we welcome the publication of this commentary on the Indian Income-tax Act as amended recently. The enactment is one of exceptional difficulty and neither the assessee nor even the ordinary legal practitioner is familiar with the intricacies of the subject. The provisions of the original enactment of 1922 and the amended sections are given side by side to facilitate comparison and a correct appreciation of the changes effected by the recent enactment. No decision of any importance in this country or England has been omitted and the decisions have been referred to in their appropriate places and the law has been stated by the authors in the words of the eminent Judges themselves. The appendices give the rules framed under the Act and all other useful information bearing on the subject. There can be no greater tribute to the excellence of the work than the fact that it has the approval of Mr. Justice Patanjali Sastri whose knowledge of Income-tax Law and Practice is unsurpassed in this part of the country. We hope that the book will receive the wide popularity among lawyers and judges and the officials of the Income-tax Department which it richly deserves.

THE INDIAN INCOME-TAX ACT by Sudhir Mohan Das Gupta, M.A., B.L., Pleader, Judge's Court, Khulna, 3rd Edition. Published by Eastern Law House, Law Publishers, 15, College Square, Calcutta. Price Rs. 6.

This is another commentary on the Income-tax Act as amended by the recent enactment of 1939. It is the third edition of the commentaries, but the first after the amendment. The book is divided into three parts. The first part gives the Act with its commentaries and the schedule and the Indian Finance Act of 1939. The second part gives the rules framed by the Central

Board of Revenue with the forms. In the third part we have all the miscellaneous information, such as the rules for the interpretation of statutes, mathematical calculations, stamps and court-fees, etc. Consequent on the far-reaching amendments of the main Act, the matter contained in the previous edition has been thoroughly revised and recast and the law has been brought up-to-date. The decisions have been referred to in their proper places. We have every hope that the book will be found useful by all those having to deal with the subject.

EASEMENTS AND LICENSES by Mr K. N. Joshi, B.A., LL.B., 1st Edition. Published by the Eastern Law House, 15, College Square, Calcutta. Price Rs. 14.

We have great pleasure in acknowledging the receipt of the book on the Law of Easements and Licenses by Mr. K. N. Joshi. It is a scholarly treatise on the subject and is the result of careful study and research by the learned author. His treatment of the subject is by way of commentaries on the Indian Easements Act in Part I of his work where the learned author discusses also the law in the Provinces where the Indian Easements Act is not in force. The commentaries do not stop with giving references to the cases and stating their effect but are by way of discussion of the principles illustrating them by reference to the cases decided in England and in India. Part II of the work deals with the rights to light, rights in respect to water, air, right of support, projections and other rights in distinct chapters. In the last chapter, he deals with the question whether an easement can originate in a grant and compares the English and the Indian conceptions on the question. The book is a valuable addition to the library of every lawyer and judge and a reference to it will be found useful on the topics touched by the learned author.

THE MUSLIM DIVORCE LAW by Mr. Jehangir Cursetji Forbes, B.A., LL.B., Advocate (Original Side), High Court, Bombay. Published by New Book Company, Hornby Road, Fort, Bombay.

This is a commentary by an experienced lawyer on the dissolution of Muslim Marriages Act (VIII of 1939). This enactment has remedied the defects in the Muhammadan Law by giving a Muhammadan wife the power to divorce her husband in the circumstances specified in the Act. The law on the subject before it was very inadequate and the enactment has enlarged the grounds for divorce by the wife. To give completeness to the subject, the learned author has also added a chapter on the subject of Divorce by Husband.

CRIME AND CRIMINAL JUSTICE by Mr. Abdul Hasanat, I.P., Superintendent of Police, Noakhali, Bengal. Published by The Standard Library, Dacca, Bengal, India. Price Rs 5-8-0. (8*s*. 6*d*.).

In this book the learned author who is a high police official deals with the subject of Criminal Sociology, Criminology, Penology, Criminal Jurisprudence and Law and Criminal Investigation. Coming from the pen of a writer who has had practical experience in daily life of the subject that he deals with, the book is of special value. The subjects are dealt with clearness and there is a great deal of information drawn from sources not easily available to the ordinary reader. The appendices give valuable information on allied topics. We have every hope that the book will be found interesting and instructive reading by police officials, lawyers and judges.

THE REVISED INCOME-TAX RULES, 1922 AND THE INCOME-TAX AND SUPER-TAX CALCULATOR by Mr. D. G. Khandekar, Law Publisher, Poona City. Price Rs. 1-4-0.

It is with pleasure that we acknowledge the receipt of a copy of the Revised Income-tax Rules and the Income-tax and Super-tax Calculator. The rules are corrected up to the 15th August, 1939. We are sure that the book will be found useful in the practical working of the income-tax officials and the assessees.

THE
MADRAS LAW JOURNAL

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THE TAXING POWER IN THE INDIAN CONSTITUTION

BY

R. RAMAMURTHI AIYAR, *Advocate.*

The way in which the taxing power is dealt with and allocated in the Government of India Act, 1935, between the Federation and the Provinces is fundamentally different from that adopted in the Australian or Canadian Constitution. The power of taxation is conferred in very general terms in the latter constitutions. In Australia the Commonwealth Parliament is given power to make laws for the peace, order and good government of the Commonwealth, *inter alia,* with respect to 'taxation, but so as not to discriminate between States or parts of States'. It has exclusive power to impose uniform duties of customs and excise. The Constitution Act preserves to the States all powers of taxation not exclusively conferred on the Commonwealth. The subjects of taxation are not specified in detail and there is a concurrent field in which both the Commonwealth and State legislatures are free to impose taxation. In Canada the Dominion Parliament has exclusive legislative authority to 'raise money by any mode of taxation', the Provincial legislatures likewise being given exclusive power to make laws in relation to 'direct taxation within the province in order to the raising of money for provincial purposes.' The only distinction in Canada is between direct and indirect taxes. In the Indian Constitution, however, legislative authority in respect of taxation is not given in general terms but only in terms of subjects, the subjects assigned to the Federation and the Provinces being specifically and expressly enumerated in the Federal and Provincial Legislative Lists.

It is frequently said that the Legislative Lists set out in the Seventh Schedule cover the entire field of legislation and furnish as exhaustive an enumeration of the subjects of legislation as is humanly possible, the provision in S. 104 of the Act being intended

only for a very remote and unforeseen contingency. Whether this is meant as a tribute to the ability of the draftsman or is resorted to as an escape from the inconveniences and difficulties arising from the enumeration of the subjects it does not seem to be correct when applied to the subjects of taxation. That the Lists are not exhaustive of the subjects of taxation is made clear not only by an examination of the Lists but also by the terms of S. 104 which expressly clothes the Governor-General with authority to empower either the Federal or Provincial legislature to make laws in regard to subjects not enumerated in the Lists *including a law imposing a tax not mentioned in any such list.*

In the Government of India Act the power to tax any subject-matter is not derived from or comprehended in the general power to legislate with respect to that subject-matter. A few instances will illustrate this position. The power to legislate with respect to 'import and export across customs frontiers' is given to the Federal legislature under item 19 of the Federal List. The power to impose import and export duties is separately conferred under item 44, 'duties of customs including export duties'. The power to make laws with respect to 'succession, save as regards agricultural land' inheres both in the Federal and Provincial legislatures (*vide* item 7 of the Concurrent List) but the power to levy 'duties in respect of succession to property other than agricultural land' is conferred exclusively on the Federal legislature under a different item, namely, item 56 of the Federal List. Item 28 of List I mentions only 'cheques, bills of exchange, promissory notes and other like instruments'. The power to fix the rates of stamp duty in respect of such instruments is granted only under item 57 of that List. 'Betting and gambling' is item 36 of the Provincial List but the power to impose 'taxes on betting and gambling' accrues to the Provincial legislature only under item 50. The subject of 'legal, medical and other professions' is in the Concurrent List being item 16 but the power to impose 'a tax on professions' is confided to the Provincial legislature under item 46 of List II.

Parliament itself proceeded on this view when it recently amended the Government of India Act by inserting an item 'tax on mechanically propelled vehicles' in the Seventh Schedule which would have been wholly unnecessary in view of item 20 of List III, 'mechanically propelled vehicles' if the taxing power was intended to be included in the grant of a general legislative power.

Taxes, duties (including stamp duties), cesses, dues and tolls are different names under which taxation is imposed in the scheme of the Indian Constitution. The Advocate-General of India in the course of his arguments in the Central Provinces Petrol case is reported to

have stated that the expression 'tax' has a larger connotation than 'duty' and that 'duty' is different from a 'tax' in that it is imposed on commodities while taxes are imposed on individuals. While it is true that 'tax' has a larger connotation than 'duty'—the definition of 'taxation' and 'tax' in the Interpretation section, S. 311 makes that clear—the distinction suggested by him is not borne out by an examination of the expressions used in the Lists in relation to the subjects of taxation. For instance, there is succession duty. It is not a duty imposed on any commodity. The distinction is perhaps this. While it must be conceded that 'tax' and 'duty' are used in common parlance and even in the Government of India Act indifferently the expression 'tax' is more often used to connote a recurring levy or one made periodically over the same subject-matter the expression 'duty' is used to connote an impost levied only once or on specified occasions only in respect of a given subject-matter. That this may be the proper distinction is apparent from the several instances of duties that one comes across, for example, customs and export duties, duties on succession to property, stamp duties and excise duties.

The taxing power is, however, not to be confused with the power to levy a fee. In the Government of India Act the power to require a licence for regulating a trade, profession, etc., is treated as falling within the scope of the power to legislate in respect of such trade, profession, etc. But the power to impose a fee for the grant of such licence is treated as an independent legislative power. In each of the three Legislative Lists in the Seventh Schedule there is an item 'fees in respect of any of the matters in this list but not including fees taken in any Court'. There is no such express subject in the Australian or Canadian Constitution. S. 92 of the British North America Act, no doubt, confers power on the provinces to legislate with respect to 'shop, saloon, auctioneer and other licences in order to the raising of revenue for provincial, local or municipal purposes'. But the fees contemplated in item 59 of List I, item 54 of List II and items 25 and 36 of List III are not levies made in order to raise revenue but are intended as *quid proquo* for services rendered or for covering the administration and supervision charges. 'Fee' is defined in the Oxford Dictionary as 'remuneration paid to a professional man for occasional services' . . . . . 'a sum paid for admission to a society or for entrance to a public building'. Wharton defines it as 'reward or recompense for services'. In Bouvier's Dictionary its meaning is given as 'reward or wages given to one for the execution of his office or for professional services'. That this is also the sense in which it is used in the Indian Constitution is made clear by the terms of S. 37 and of the analogous S. 82 of the Act. S. 37 provides that a bill or

amendment making a provision for imposing or increasing any tax shall not be introduced or moved except under the recommendation of the Governor-General. Sub-S. 2 says that a measure is not to be deemed a taxing one by reason only that it provides for the demand or payment *of fees for licences or fees for services rendered.*

The distinction between a tax and a fee is explained by the Rangoon High Court in *Municipal Corporation of Rangoon v. Sooratee Bara Bazaar*[1] and this has been accepted by the other High Courts and by the Privy Council in *Pazundaung Bazaar Co. v. Municipal Corporation*[2].

Neither the name given to a particular imposition nor the amount of the levy is conclusive on the question whether it is a tax or a fee. The Madras Regulation of the Sale of Cloth Act (Act XII of 1937) requires an annual licence to be taken out by every dealer in cloth and imposes what is styled a 'fee' of Rs. 2 or Rs. 5 according as the monthly turnover does or does not exceed Rs. 3,000. It exempts dealers dealing exclusively in hand-woven cloth from the payment of the fee for the licence. There are no other provisions in the Act for regulating the sale of cloth. It is clear therefore that though it is called a fee it is really a tax on dealers, the object of the legislation being to encourage hand-loom cloth and to raise a small revenue for provincial purposes.

The recent amendment to the Government of India Act limiting the tax that may be imposed by the Provincial legislatures on trades, professions, callings and employments to Rs. 50 a year gives additional importance to the distinction between a tax and a fee and may give rise to a question whether the limitation in regard to the amount of tax is to be construed as involving the conclusion that a fee imposed by the Provincial legislature for a licence in respect of any trade, profession, calling or employment cannot exceed Rs. 50 and if it does it is *ultra vires* the Provincial legislature.

The taxing power in the Indian Constitution is an exclusive power. If power to impose a tax on any specified subject-matter is conferred on the Federal Legislature it is excluded from the Provincial power and *vice versa*. In other words, there is no concurrent list for purposes of taxation. It may be urged that the rule with regard to the interpretation of the Lists, namely, that a subject which may in one aspect and for one purpose fall within the Federal list may in another aspect and for another purpose fall in the Provincial List when applied to the items in the Lists relating

1. (1927) I.L.R. 5 Rang. 212 at 219.
2. (1931) 61 M.L.J. 740: L.R. 58 I.A. 313: I.L.R. 9 Rang. 440 (P.C.).

to taxation would necessarily lead to the result that even in regard to taxation there might be a concurrent field. In the Central Provinces Petrol case before the Federal Court no such argument seems to have been put forward on behalf of the Provinces. The provisions of S. 100 of the Government of India Act forbid such an argument and the judgment of the Federal Court gives no support to the position that viewed as an excise duty the impugned tax could fall legitimately under item 45 of the Federal List, viewed as a tax on the sale of petrol it could also legitimately fall under item 48 of the Provincial List and that both the Central and Provincial legislature would be competent to impose the tax in question.

Neither the Federal nor the Provincial legislature can enlarge the scope of its taxing powers beyond the limits expressed in the constitution by attempting to define the subject-matter of the power in a particular case. For instance, power to impose a tax on the sale of goods is conferred on the Provincial legislature but it is not open to that legislature to impose a tax on what is not a sale by calling it or including it in the definition of sale. In this view the Explanation to the definition of 'sale' in the Madras General Sales Act which brings a transfer of goods under a hire-purchase agreement within the meaning of a sale even before the option to purchase is exercised would seem to be of doubtful validity. *See also* Isacs and Riche, JJ., in *Waterside Workers' Federation* v. *C. W. Steam Ship Owners Association*[1].

An examination of the language employed in the various items in the Legislative Lists relating to taxation shows that Parliament intended to confer legislative authority to impose taxation in terms of subjects or topics and not with reference to the persons on whom the incidence of the tax might in the first instance or ultimately fall. Barring taxes on passengers (and possibly capitation taxes) which by their very nature are taxes on persons the subjects of taxation enumerated in the Lists are acts, transactions or things and not persons described in terms of their relation to such acts, transactions or things. For instance, item 42 of the Provincial List speaks of 'taxes on land' and not 'taxes on the owner, occupier, mortgagee or other person having an interest in land'. If Parliament intended that a specified tax should necessarily be imposed on a particular person it has expressly said so as in the case of 'taxes on passengers' and has not left the same to be inferred from the language used in the Lists to describe the subjects of taxation. The above view is in keeping with the opinion of the Federal Court in the Central

1. (1929) 28 C.L R, at 232.

Provinces Petrol case where the item 'duties of excise on goods produced or manufactured in India' was construed to be limited to taxes imposed at the stage of or in connection with the production or manufacture of the excisable goods. No member of the Court suggested that the tax should be imposed only on the producer or manufacturer. On the other hand it was observed that a tax on the first seller might well be an excise duty. Again, it would not be legitimate to infer from the use of the expression 'sale' in the item relating to taxes on the sale of goods that it was the intention of Parliament that the tax should be levied on or borne only by the seller of the goods. The expression 'sale' is used only in the sense in which it is used in the law of sale of goods, *viz.*, a transfer of property in the goods for a price. In this view the provisions of the Madras General Sales Act which proceed on the footing that it would be lawful to levy the tax on the seller or the buyer or the broker or any other person who takes any part in or is intimately connected with the transaction of sale would not be open to challenge.

The limits of the taxing power, the detailed examination of the items and the reconciliation of the competing entries in the Federal and Provincial Lists must be reserved to a future occasion.

SUMMARY OF ENGLISH CASES.

MILNE *v.* COMMISSIONER OF POLICE FOR CITY OF LONDON, (1940) A.C. 1 (H.L.).

Crimes—Gaming and wagering—Using the telephone in club premises for betting with book-makers outside—If using the premises for betting purposes.

The mere use of the telephone in club premises for betting with book-makers outside, was not sufficient to establish the offence of using the premises for betting purposes.

CULL *v.* INLAND REVENUE COMMISSIONERS, (1940) A.C. 51 (H.L.).

Income-tax—Finance Act (1931), S. 7—All Schedules Rules, r. 20—Dividend received from company "without deduction of tax"—If to be "grossed up for purposes of sur-tax."

The appellant was the holder of 20,000 ordinary shares of £1, all issued and fully paid in an unlimited company. In March, 1934, a dividend of 21*s.* per share was paid. In his return of total income for sur-tax purposes the appellant included the sum

of £21,000 (his dividend). The Assessing Commissioners added £7,000 as representing income-tax in respect of this dividend.

Held, *Neumann* v. *Inland Revenue Commissioner*, (1934) A.C. 215, is an authoritative interpretation of S. 7 (2) of the 1931 Act; and *Inland Revenue Commissioners* .v. *Pearson and Pratt*, (1936) 2 K.B. 533, were wrongly decided and must be overruled. If a company does not exercise its right of deduction and chooses to pay its dividends without deduction of tax, the dividend is gross even though it is paid out of taxed profits and there is no scope for "grossing up" what is already gross.

(1938) 2 K.B. 109: (1938) 1 All. E.R. 467, reversed.

BARNES *v.* HELY HUTCHINSON, (1940) A.C. 81 (H.L.).

Income-tax—Dividends on preference shares in an Indian company holding shares in two British companies whose profits had suffered British income-tax—If could again be subjected to British income-tax.

The respondent is the holder of 525 preference shares of Rs. 1,000 each in a company registered in Calcutta which is the holder of ordinary shares in two companies registered in England. The whole of the profits of the two British companies were assessed to British income-tax. The Indian company received the dividend after deduction of British income-tax. The Indian company also received other income which had not suffered deduction for British income-tax and the proportion of taxed to untaxed income was agreed to be 44·12 to 55·88. On 22nd June, 1931, the respondent was paid as dividend upon his preference shares Rs. 42,000 without any deduction for income-tax. He was assessed on the full amount of the dividend. His contention that 44·12 per cent. of the dividend having already borne British income-tax could not again be subjected to British income-tax, was upheld by the Courts below.

Held [reversing (1939) 1 K. B. 93], the preference shareholder who receives his full dividend has suffered nothing directly or indirectly. There is no question of double taxation. That a larger sum of profits out of which he receives his dividend is diminished by tax is nothing to him and there is nothing either unjust or contrary to the statute in exacting tax for the first time from him and respondent's claim for abatement fails.

FRANCIS DAY AND HUNTER, LTD. *v.* TWENTIETH CENTURY FOX CORPORATION, LTD., (1940) A.C. 112 (P.C.).

Tort—Passing off and infringement of copyright—Use of the title of a musical composition as title of a talkie—How far infringement of copyright and performing right.

There cannot be an infringement of performing right in a musical composition unless there has been a public performance of the musical composition by the defendant. A bare copying of the title of a musical composition as a title of a talkie film is not an infringement of performing right. In general a title is not by itself a proper subject-matter of copyright. As a rule a title does not involve literary composition and is not sufficiently substantial to justify a claim to protection, unless it be on so extensive a scale and of so important a character. The two things are completely different and the use of the title in the absence of other circumstances calculated to mislead does not constitute a passing off.

WESTER WEMYSS, *In re*: TILLEY *v.* WESTER WEMYSS, (1940) 1 Ch. 1 (C.A.).

Will— Executors— Administration action by creditor— If plaintiff's right to costs can deprive the personal representative of his right to retainer—Direction of Court as to costs.

Per *Greene, M.R.* and *Finlay, L.J.* (*Luxmoore, L.J., dissenting*).—Assets in respect of which the executor is entitled to exercise and claims to exercise a right of retainer are in effect withdrawn from the pool of assets available for the payment of debts of the same or a lower degree. Payment into Court in an administration action is without prejudice to the executor's right and does not affect the substance of the situation, it being mere machinery for preserving the assets pending a decision upon the executor's claim. The inevitable result is to preserve the priority of that claim over the plaintiff's costs of action. The discretionary power of Court as to costs ought not to enable the Court to override a definite and well-established legal right such as that of retainer.

Decision of Crossman, J., (1939) 1 All. E.R. 382, affirmed.

PAINE, *In re*: WILLIAMS, *In re*: GRIFFITH *v.* WATERHOUSE, (1940) 1 Ch. 46.

Conflict of laws—Marriage—Marriage in Germany by German with deceased wife's sister whose domicile was English—Validity in England.

A testatrix bequeathed a sum outside to her daughter for life and if she left issue absolutely with a gift over in default of issue. The daughter while domiciled in England married her deceased sister's husband (a German) in Germany according to whose laws the marriage was valid. On the death of the daughter leaving an issue surviving,

Held, the marriage could not be made by English Law and the absolute gift failed.

In re——B's SETTLEMENT: B—— *v.* B——, (1940) 1 Ch. 54.

Guardian and Ward—Custody of Ward—Previous order of foreign Court—How far binding.

Under Guardianship of Infants Act, the Court is bound to exercise a judgment of its own when dealing with the custody of a ward. The welfare of the infant is of a paramount consideration whatever orders may have been made by a foreign Court. The weight to be attached to such foreign orders might depend upon the circumstance of the particular case which the Court had to decide.

YOUNGMAN *v.* PIRELLI GENERAL CABLE WORKS, LTD., (1940) 1 K.B. 1 (C.A.).

Master and servant—Death of servant while engaged as electric linesman—Absence of evidence of negligence on defendants' part—Res ipsa loquitur—*If applicable.*

An electric linesman under his foreman's orders ascended a pole carrying a live wire for placing another wire in position. Near the top of the pole he was electrocuted and died immediately. In a claim against the Master under the Fatal Accidents Act by the dependants on the ground of negligence and breach of statutory duty, there was no evidence of negligence and it was contended that the doctrine of *res ipsa loquitur* applied.

Held, in the circumstances the principle *res ipsa loquitur* did not apply.

HICKMAN *v.* POTTS, (1940) 1 K.B. 29.

Landlord and Tenants Act (1709), S. 1—Distress for rents and distress for rates—Priorities—Distress for rates if "execution."

The levying of a distress for rates under a justice's warrant is in reality an execution within Landlord and Tenants Act, 1709, S. 1, and the amount due for rent to the landlord is a first charge on the proceeds of such distress. *"Communis error facit jus"* is a maxim of limited application and affords no ground for perpetuating an error.

PERKINS *v.* HUGH STEVENSON & SONS, LTD., (1940) 1 K.B. 56: (1939) 3 All. E.R. 697 (C.A.).

Workmen's Compensation Act (1925), S. 25 (1) and (2)—Receipt of compensation under act for injuries—Effect on right to claim damages at common law.

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Where a workman has received compensation pursuant to a claim made under the Act (even though with no knowlege of his right of option to claim either under the Act or at common law) the effect of the second portion of cl. (1) sub-S. (*i*) of S. 29 is to exempt the employer from liability to pay compensation both under the Act and outside the Act to the same person in respect of the same accident. There is no machinery by which the money a workman has received as compensation can be set off against or deducted from the damages to be awarded to him at common law. The claim under common law must be dismissed.

BARROWFORD HOLDINGS, LTD. *v.* INLAND REVENUE COMMISSIONERS, (1940) 1 K. B. 81 (C. A.)

Finance Act (1922), S. 21 (6)—Subsidiary of foreign company—If "subsidiary company" within S. 21 (6)—Direction as to undistributed income of such company—If can be made.

The subsidiary of a foreign company is not a subsidiary company within the meaning of the Finance Act, 1922, S. 21 (1) as amended by the Finance Act, 1927, S. 31 (3) and a direction as to the undistributed profits of such company can be made so that it can be deemed to be the income of the members for purposes of sur-tax.

(1939) 2 K. B. 607, affirmed.

STOVELL *v.* JAMESON, (1940) 1 K. B. 92: (1939) 4 All. E. R. 76 (K. B. D.)

Betting and Lotteries Act (1934), S. 3 (2)—Football pool—Coupons accepted at premises and despatched to promoters of pool —If premises used to 'effect' betting transactions.

To constitute an offence under the section it was not necessary for the transaction to have been actually completed at the premises. A tobacconist's shop where completed coupons were accepted and despatched to the promoters of the football pool is premises used to "effect" betting transactions.

NELSON *v.* COOKSON, (1940) 1 K.B. 100: (1939) 4 All. E.R. 30 (K.B.D.).

Public Authorities Protection Act (1893), S. 1—Medical officers of County hospital—Claim against for negligent operation —Limitation of six months under the Act—If applicable.

In a claim for alleged negligence in performing an operation on an infant plaintiff against the assistant medical officers of a County hospital, brought six months after the alleged negligence,

Held, the medical officers were performing a public duty (and not independent contractors) and entitled to the protection of the Public Authorities Protection Act, and the claim is barred.

DAVIS *v.* FOOTS, (1940) 1 K.B. 116 (C.A.): (1939) 4 All. E. R. 4 (C.A.).

Landlord and tenant—Removal of gas fire in a room in premises let without replacing a tap on the pipe—Escape of gas causing injury to tenants—Liability of landlord on contract or tort.

Plaintiff and her late husband agreed to become defendants' tenants. Defendants who were occupying the premises removed along with their furniture a gas-fire from the grate leaving the pipe open. At that time gas was turned off at the main. When plaintiff and her husband slept in the room, from which the gas fire had been removed, when gas was turned on, the gas escaped and rendered the couple unconscious. The husband died of gas poisoning and plaintiff was seriously ill. Plaintiff sued for damages in respect of the loss of her husband.

Held, the defendants were not liable in tort, and no contract to exercise any care and skill with regard to the gas-fire by the defendants was proved.

CLARK *v.* SMITH, (1940) 1 K.B. 126 (C.A.): (1939) 4 All. E. R. 59 (C.A.).

Bankruptcy—Trustee in bankruptcy carrying on business of bankrupt—If contrary to Bankruptcy Act, S. 56—Effect on right of trustee to sue on a guarantee in respect of the carrying on of the business.

On the bankruptcy of an eating house-keeper, the creditors decided that the trustee in Bankruptcy should carry on the business. The defendant executed a guarantee to the trustee. When a claim on the guarantee was sought to be enforced the guarantor contended that the carrying on of the business was contrary to the provisions of Bankruptcy Act, 1914, S. 56.

Held, it is only on the motion of persons interested in the estate that resolutions which offend against S. 56 (1) (being for the benefit of the estate) can be impeached and held to be invalid. As against the world the carrying on of the business of the trustee can create legal relations between him and third parties, either as debtor or creditor incurred in the carrying on of the business notwithstanding that it is carried on otherwise than solely for the beneficial winding up of the estate. It is not illegal or void on any basis of public policy and the guarantee is enforceable.

English *v.* Western, (1940) 1 K.B. 145: (1939) 4 All. E.R. 345 (K.B.D.).

Motor insurance against third party risks—Exclusion of indemnity against claims by "any member of assured's household" —Sister of insured—If member of his household.

A policy of motor insurance provided that the under-writers shall pay "all sums which the insured shall become legally liable to pay by way of compensation for death or bodily injury to any persons including the passengers, occasioned by or arising out of the use of the car, but excluding...... (*b*) death or injury to any member of the assured's household who is carried in or upon the car." In respect of a claim by the sisters of the insured who was living in his house,

Held, that the claim excluded by the words "member of the assured's household." "Household" means a "family living together" and in no sense are the words confined to people who are under the domestic governance of the *pater familias,* or somebody in *loco parentis.*

Herschtal *v.* Stewart and Ardern, Ltd., (1940) 1 K.B. 155: (1939) 4 All. E.R. 123 (K.B.D.).

Tort—Negligence—Supply of a reconditioned car with a wheel not properly tightened—No anticipation that there will be any intermediate examination as would be likely to reveal a defect—Liability for accident due to defective condition.

Where the defendants supplied a reconditioned car the rear wheel of which was not properly tightened in circumstances in which they did not anticipate and could not reasonably have anticipated, that there would be any such intermediate examination as would be likely to reveal a defect such as existed in the motor car, and an accident occurred, the defendants are liable on the basis that they were the plaintiff's neighbours in law and were supplying a dangerous article for his user. (Case-law reviewed.)

Holloway *v.* Poplar Corporation, (1940) 1 K.B. 173: (1939) 4 All.E.R. 165 (K.B.D.).

Resolution by a Borough Council for payment of a gratuity of £268-16-10 payable at 10s. weekly to a retired servant—Payment for some weeks—Claim for immediate payment of balance of whole amount—Enforceability.

In a claim by an ex-employee for immediate recovery of the whole of the gratuity which the employer a borough council had passed a resolution to pay in weekly instalments,

Held, the resolution is not a grant. It does not create nor supply evidence of a contract and it imposes no obligations on the defendant. As to the contention that the statute provided "a gratuity" and the resolution for weekly payments of the amount is *ultra vires*. *Held*, a gratuity payable in instalments is not several gratuities and in any event by Interpretation Act, 1889, singular includes plural.

JOTTINGS AND CUTTINGS.

The Week's Personality.—Though a descendant in the female line of the great Chief Justice Coke, Nathaniel Lindley was not at first destined for the law. At the age of eighteen he was sent to France to learn French with a view to entering the Foreign Office, but he soon gave up the idea of a diplomatic career, and on the advice of an uncle who was a solicitor he joined the Middle Temple in 1847, and there he was called to the Bar three years later. His pupillage in chambers extended over the extraordinary period of four and a half years. For twenty-five years he practiced in Chancery, and by the end of that time was making well over £4,000 a year. In spite of his eminence at the Bar it was something of a suprise to the profession when Lord Cairns offered him a common law judgeship in 1875. The Judicature Act, embodiment of the iconoclastic zeal of the Victorians, had already cast its shadow on the Courts at Westminster, but still none but a serjeant-at-law could ascend the Bench there. Lindley thus became a member of the Order of the Coif which was destined to vanish with him, for when he died in 1921 he was the last survivor. As a Lord Justice in the Court of Appeal, as Master of the Rolls, and finally in the House of Lords, he won a place among the great judges of England.—*S.J., 1939, p. 906.*

Old Elms.—A recent newspaper correspondence about the great age and strength of elms reminded me of a story of Lord Mansfield. A witness named Elm once gave evidence in a case before him with remarkable clarity and force though he was over eighty. On examination by the Chief Justice as to his way of life, he declared that he had always risen early and lived temperately. "Ay," said the judge, "I have always found that without temperance and early habits longevity is never attained". The next to be called was an elder brother of this model witness and surpassed him in clear-headed intelligence. "I suppose," said Lord Mansfield, "that you also are an early riser." "No, my lord", was the reply, "I like my bed at all hours and specially I like it in the morning."

"Ah! but like your brother you are a very temperate man," suggested the judge. "My lord," declared the venerable Elm, "I am a very old man and my memory is as clear as a bell, but I can't remember the night when I've gone to bed without being more or less drunk." Thereupon counsel said that this seemed to show that after all habitual intemperance favoured longevity. "No, no," replied the Chief Justice, "this old man and his brother merely teach what every carpenter knows—that elm, whether it be wet or dry, is a very tough wood".—*S.J., 1939, p. 906.*

Costs.—An old and not unfamiliar story has come down to us of a certain judge, in whom the sense of humour was highly developed, who, having dealt exhaustively with the legal problems involved in the case which he had just tried, proceeded with mock-gravity to say: "Now we come to the real merits of the dispute—the question of costs". No doubt costs play a notable part in litigation; that is inescapable, and has to be faced. Hitherto it has been generally assumed that the House of Lords will refuse to entertain an appeal where the question involved is one of costs only, but last week Lord Wright, in an appeal from Northern Ireland, stated that this cannot be regarded as an inflexible rule. In that case the appellants had been ordered to pay the costs involved of their unsuccessful opposition to the grant of a licence for the sale of intoxicating liquors in Belfast, and the House held that they were entitled as "persons aggrieved" to bring the case by way of appeal to the House. It is true that their appeal failed on the construction of a section of the relevant licensing statute, but Lord Wright's ***dictum*** should be borne in mind. According to "Blackstone," the common law did not in terms allow costs, though in reality they were considered and included in the grant of damages if these were given. The Statute of Gloucester was, it appears, the first legislative authorisation for the allowance of costs *eo **nomine***. Oddly enough, says "Blackstone", a defendant received no costs till much later, but at last it came to be recognised that a successful defendant should be awarded costs just as the plaintiff would have had if he had been the successful litigant.—*S.J., 1939, p. 913.*

No Chewing in Court.—Mr. Harris recently upheld the decorum of the proceedings at Marlborough Street Police Court by ordering the ejection of a youth who was chewing gum. "Nobody is allowed to chew gum in this Court," he declared. "If anybody else is chewing gum he had better go outside". To the best of my knowledge, information and belief that is the

first time that this particular offence against the dignity of judicial officers has been publicly denounced. Wearing or not wearing a hat, according to the sex of the offender, has been a fruitful source of comment. Spitting, too, has been explicitly discouraged. In the case of each, Ireland has produced remarks which could not be bettered. "I see you standing there like a wild beast with your hat on," exclaimed Mr. Justice Mayne once to a man who had forgotten to uncover himself in a Dublin Court. Then there was the judge who ordered out someone who had expectorated in his presence. "You have got the whole of the County of Kerry to spit in without coming into my Court," he said. Even smiling may be taken amiss. At Bodmin there used to live an old man whose face was permanently distorted in a ghastly grin. Once, after there had been some unseemly laughter in the Assize Court, Mr. Justice Denman caught sight of him and called out angrily: "You wicked old man, I'll send you to prison." Of course his expression did not change and eventually he was ejected, still apparently grinning. —*S.J. 1939, p. 922.*

Audience before Tribunals.—There has been comment concerning the right (or denial of the right) of audience before the bodies set up to administer certain of the provisions of the war-time legislation. The tribunals which have been particularly criticised are those set up to deal with aliens, and the "Hardship" committees constituted under the National Service (Armed Forces) Act, 1939. The criticism has been directed to the fact that solicitors and counsel are expressly denied the right of audience before these bodies, as though the evil of the denial is solely in preventing the lawyer from earning his fees. It is true that a man who has spent years in training himself to present the case of his client to the Courts, and who pays heavy dues for the privilege of being able to practice, has some title to claim that the Government to which he pays those dues should not prevent him from practising in circumstances for which his training has particularly fitted him.

This is a reasonable argument, but there is another side to the matter. British subjects and others who are living under the King's protection are denied the right of employing skilled men to put their cases before the tribunals. It is one of the most difficult things in the world for a man without previous training to put his case clearly and adequately before a tribunal. It is more than ever difficult for him to do so when he is appearing before a legal tribunal perhaps for the first time in his life; when the knowledge that on the proper presentation of his case depends his liberty and perhaps ultimately his life puts him into a state of high nervous

tension. Anyone who in the county court or the police court has seen the pathetic attempts of the defendant in person to put his defence before the court, or to cross-examine witnesses, knows the difficulties and hardships which confront the layman who scorns or cannot afford professional assistance. If this applies to an English man appearing before an English court, what an ordeal must it be for an alien—with perhaps a scanty knowledge of the language and probably complete ignorance of the law—to appear before what is to him an alien tribunal.

It is true that a man is allowed to bring to hearings before these bodies, a friend and witnesses, and (in the case of the "Hardship" committees) a representative of the trade union to which he belongs. This, however, does not in any way answer the criticisms which have been suggested above, but rather aggravates the injustice of the position which has been created. Many of the people concerned will not belong to a trade union, but in any event a trade union official is no proper representative to put a man's case before a tribunal, because he seldom has the training or experience necessary for the examination or cross-examination of witnesses.

It is no answer to the criticisms to say that the men at present constituting the tribunals are (as I believe them to be) just and upright men. In the first place they cannot make a satisfactory decision upon a case which is not completely put before them. In the second place it is fallacious to argue that because the present members of the tribunals are just men, and will hold the scales evenly between the claims of the Crown and those of the subject, and will not take advantage of an ignorant man, therefore the tribunals will always be fair.

The tribunals are not strictly judicial bodies in the sense that our Courts of Justice are. They are rather administrative bodies. Even so a subject should not be deprived of the right to employ skilled assistance in dealing with them. The duties of Income-tax Inspectors are also administrative, but the tax-payers are not on that account prevented from employing solicitors to conduct negotiations with the authorities on their behalf.

In a democratic country there is no emergency which can justify depriving a man of his right to have his case put before a tribunal in the most favourable light possible. In war time, when so much depends on the people being contented, it is more than ever necessary to remember the precept that it is not enough that justice should be done—it must plainly be seen to be done. The denial to ordinary people of the right to employ skilled men to present their case in the most favourable light will lead inevitably to the feeling that advantage is being taken of their ignorance

by astute officials, and that their elementary rights are in peril of being taken away from them. They will lose their faith in their judicial bodies, and when that happens the rule of law upon which the constitution rests will crumble away.—*L.J., 1939, p. 350.*

Professor Edward Jenks —The late Professor Edward Jenks, who passed away on 10th November, was a considerable contributor to the literature of English Law, and his contributions cover a wide sphere. His *Law and Politics in the Middle Ages, The State and the Nation,* a development of an earlier and thought-provoking primer on the history of politics, and *The New Jurisprudence,* represent some of his survey of the borderland between law, history and political philosophy, of which he was a most lucid exponent as well as a widely read scholar.

His outline of *English Local Government* and *The Government of the British Empire* display his capacity for interesting narrative without sacrifice of essential detail, and the same may be said of his *Short History of English Law,* all of which books, while valuable to the technical student of law, are appropriate for those who approach these subjects without either any intention of, or equipment for, the professional study of law. An earlier handbook on *Husband and Wife in the Law* showed that the late Professor Jenks possessed a remarkable felicity for expounding law to the laymen, and this reached its highest point in *The Book of English Law,* which surveyed the whole field with a maximum of clarity and the minimum of technicality.

In the sphere of legal studies strictly so called, Professor Jenks contributed in his *Modern Land Law* (1899) a text book which showed him to be a real property lawyer of great learning. Notwithstanding changes which have taken place in the law since its publication, it is still a very valuable work of reference, and characterised by that eloquence of exposition which was the hallmark of all his narrative works. He stamped the influence of his personality upon the several editions of *Stephen's Commentaries* for which he was responsible, obviously most evident in the sections of which he had especial charge. His greatest legal work, however, was that of editorship-in-chief of the *Digest of English Civil Law,* a masterly statement of the existing civil law of England to which he himself was a personal contributor.

DIGEST OF CIVIL LAW.

It is in the nature of a code, although being unofficial it can only claim to state the rules as upheld by the accredited legal authorities. The *Digest,* while in the main limited to the enunciation of the rules, contains notes of acute criticism and the

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light of historical research is at appropriate places abundantly manifest. The value of a work such as this in a legal system which is uncodified is obvious, and its utility both for academic and practical purposes has been widely recognised. Quite naturally it has appealed to the foreign jurist both in his pursuit of comparative jurisprudence and in his endeavours to obtain within a short compass a conspectus of the whole of the civil legal system of England. To the common lawyers both of England and the United States of America it has revealed in a bold light the wealth of the legal heritage to which both countries have succeeded.

Professor Jenks collected around him a body of learned lawyers, he himself contributing (*inter alia*) the important sphere of property law—a work of immense labour in the latest edition by reason of the necessity for the incorporation of the new property legislation.

In the preface to this edition the late editor observed that "it is in the nature of things unlikely that" he "will be privileged to take part in a later edition of this work". The lines now have a pathetic interest, but pathos yields to gratitude for the work of a great jurist who enlarged and deepened the learning of the law and endowed it with a broader scope and a wider vision.—*L.J., 1939, p. 355.*

BOOK REVIEWS.

LAW OF INCOME-TAX, by V.S.Sundaram, Published by Messrs. Butterworth & Co., Bombay, 1940. Price Rs. 16/-.

The recent amendments to the Law of Income-tax have almost transformed the Act and all previous commentaries have become both out of date and misleading. The introduction of the slab system, the treatment of foreign companies, the inclusion of accrued foreign income in the case of companies resident in British India, the treatment of unregistered firms, and the institution of an appellate tribunal are a few of the many changes which the amendment has introduced in the Act. It is, therefore, well that the 5th Edition of Mr. Sundaram's book, thoroughly revising everything that had to be revised in his previous edition is published so soon after the coming into force of the Act. The law on this branch of the subject is technical and requires an inside knowledge of the working of the Act in practice quite as much as of the rules of interpretation and the case-law on the subject. Mr. Sundaram's close and intimate connection with the departments administering the law has given him that inside knowledge of the working which makes this commentary invaluable not only to the lawyer and the judge, but also to the tax giver and the

tax gatherer. On the legal aspect of it, his commentary is profuse with quotations, in fact fuller than what a purely legal text book need contain. Extracts from both the leading English and Indian cases abound, and so far as one can see, nothing of significance has been omitted. From the businessmen's point of view, the book is replete with illustrations which bring out in a concrete form the actual problem and how it was solved. The rules made by the Central Government appear at the relevant places to guide one, either in the interpretation or the application of the sections. In solving the many difficult problems that may arise as to the mode of taxation, the ambit of taxable persons, the rules of exemption, the provisions against evasion, and above all on what is and what is not income, this latest book, dealing exhaustively, as it does, with those intricate questions, will be found to be of invaluable assistance to everyone that has to deal with this branch of the law. We commend the book as a very useful contribution to the literature on the subject.

BROOM'S LEGAL MAXIMS (Tenth Edition) by R. H. Kersley, M.A., LL.M. Publishers, Sweet and Maxwell, Ltd., 2 and 3, Chancery Lane, London, W. C. 2. 1939, Price 32*s*. 6*d*. net.

To praise the worth and usefulness of a book like Broom's Legal Maxims nearly a century after its first publication in 1845 and especially after the many editions it had run through under able editors is to gild the gold. "The frequency with which maxims are not only referred to by the Bench, but cited and relied upon by counsel in their arguments; the importance which has, in many decided cases, been attached to them; the caution which is always exercised in applying, and the subtlety and ingenuity which has been displayed in distinguishing between them, seem to afford reasonable grounds for hoping that the mere Selections of Maxims here given may prove useful to the profession, and that the examples adduced and the authorities referred to by way of illustration, qualification, or exception, may, in some limited degree, add to their utility" are the words of Dr. Broom himself describing his purpose when launching this publication into the legal world. True, that many of the Maxims given here are derived from the Roman law, but at the same time they are so well grounded upon reason, public convenience and necessity, that it is no wonder they have been accepted as recognised principles in the codes of many a civilized nation. Moreover, the work of Dr. Broom may be said to be comprehensive also in that the various branches of law which have come under his purview range over topics like Constitutional Law, Property, Marriage and Descent, Interpretations of Deeds, Contracts and Evidence. If it is no mean labour to consult Reports, both ancient

and modern, and also standard treatises on leading subjects of law in order to find out what Maxims are of frequent occurrence in legal matters and of immense practical value, then again we should have no hesitation in owning that Dr. Broom showed wonderful capacity for selection and plan of execution.

Hence, there is every justification for as many editions of the book as there have been occasions caused by statutory developments necessitating the re-writing of parts of the text as well as additions in the shape of judicial decisions altering the course of law. The present edition has slightly grown in size over the previous one which was published in 1924. The change, if any, in the topical arrangement is negligible and is made only to such an extent as has been found inevitable by the circumstances.

It is said that the work became a legal classic even long before the death of Dr. Broom. The fame that is its due has stood the test of time, and when we stand in the middle of the twentieth century and gaze back at its date of origin, we feel proud to recognize the results of human endeavour lasting in their utility.

THE LAW OF INCOME TAX IN BRITISH INDIA by Messrs. Radhabinod Pal, M.A., D.L. and Balai Lal Pal, M.A., B.L., Volumes I and II. Published by the Eastern Law House, 15, College Square, Calcutta. Price Rs. 15.

This work in two volumes is a commentary on the Indian Income-tax Act as amended upto date by Dr. Radhabinod Pal who is an author of several well-known text books on important branches of law and a Tagore Law Professor. The subject of Income-tax Law is not one with which the ordinary legal practitioner is familiar and the recent amendments to the Act have not made it more intelligible. The learned authors have done their difficult task of expounding the subject in a satisfactory way by their explanatory notes and commentaries on the provisions of the Act. In the first volume, they give the original and the amended provisions in parallel columns to facilitate their comparison. The rules framed under the Act are then given. Then follow the commentaries explaining the sections and giving the decisions English and Indian with an examination of the principles underlying them. In cases of conflict, the learned authors mark their predilection by giving their reasons for their opinion. By way of illustration, we would refer to the commentaries under S. 54 of the Act, where they discuss the cases on the question of the admissibility of the copies of assessment orders and the statements made by the parties before the Income-tax authorities and give their opinion against the recent decision of the Madras High Court in *Pentapati Venkataramana* v.

Pentapati Varahalu, 50 L.W. 681. The second volume gives all the Indian enactments on Income-tax from the beginning with the statements of their objects and reasons and the texts of the English Statutes of 1842 and 1918. We hope that with such valuable material, the work will meet with the popularity which it so richly deserves.

THE MADRAS AGRICULTURISTS' RELIEF ACT (IV OF 1938) by Messrs. R. Narasimha Aiyar, M.A., B.L. and C. V. Srinivasa Aiyar, B.A., B.L., Vakils, Tuticorin. Published by The Huxley Press, Madras. Price Rs. 1-8-0.

The Madras Agriculturists' Relief Act though passed only in 1938 has given rise to many difficulties in the construction of its provisions and various questions under the Act have been coming up frequently before the courts and their decisions have not been uniform. Under these circumstances, a commentary of the Act which collects the decisions given up to date and discusses the language of the sections is bound to be of use. The learned authors of this small book have done this service. The difficulty of their task has been increased by the fact that many of the decisions have not been fully reported but have appeared only in short notes in legal journals and short notes apart from indicating that decisions have been given on particular points are not always full in the statement of facts or law. In spite of these difficulties, the learned authors have to be congratulated on the quality of the work which leaves little to be desired. Fairly long extracts have been given of the cases reported in the short notes in the legal journals and references have been given to the decisions fully reported. The commentaries are both explanatory and analytical. The appendices to the book give the rules framed under the Act. We have every hope that the book will be widely used by all those having to deal with the Act.

THE CODE OF CIVIL PROCEDURE (ACT V OF 1908) by Messrs. V. V. Chitaley, B.A., LL.B., Senior Advocate, Federal Court and Editor, All India Reporter, Nagpur and K. N. Annaji Rao, B.A., B.L., Advocate, High Court, Madras. Volumes 1 and 2 (Third Edition). Published by the All India Reporter, Ltd., Nagpur. Pre-publication Price Rs. 30.

We acknowledge with thanks the receipt of volumes 1 and 2 of the third edition of Mr. Chitaley's Civil Procedure Code. Ever since the appearance of the first edition of this work, it has taken a leading place among the commentaries on the Civil Procedure Code by reason of its comprehensiveness and collecting together all the materials contained in the previous works on the subject. It has

also rendered references to the digests unnecessary in a large measure. It has therefore become a useful book of reference to the busy lawer. Since the appearance of the last edition, both the legislature and the High Courts have introduced changes in the body of the Code and its first schedule. They have all been incorporated in these volumes and all the decisions have been noticed. It is therefore the most up to date commentary on the enactment.

PRINCIPLES OF INSURANCE LAW IN BRITISH INDIA by Mr. Nrisinha Das Basu, B.L., Advocate. Published by The Eastern Law House, Calcutta. Price Rs. 8.

It is with great pleasure that we acknowledge the receipt of the Principles of Insurance Law by Mr. Basu. Mr. Basu is already familiar to lawyers as the author of many legal publications and the book under review deals with the subject of Insurance Law which is dealt with in its natural order in a number of chapters each dealing with a particular topic and its sub-divisions. He has drawn largely from the works of the leading authors on the subject whose works will not be easily available to the practitioners and judges, especially in the mofussil. The introduction to the work gives a connected account of the law tracing it from its origin and bringing it to the present day. It is needless to say that all the Indian and the important English decisions have been referred to and fairly long extracts have been quoted from the judgments of eminent judges. The appendices give the enactments on the subject. The first appendix gives the Insurance Act of 1938 with notes. We are sure that the book will be found useful by all persons having to do with the subject of insurance.

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A CRITICAL NOTE.

SURAJMAL DEORAM BHAVSAR *v.* MOTI RAM KALU WANI, I.L.R. (1939) Bom. 658.

The enforcement of the liability of a Hindu father governed by the Mitakshara Law under a decree obtained against him against the shares of his sons presents a number of difficulties and it is not strange that the authorities are not uniform on the point,—though it is one of frequent occurrence and the subject of numerous decisions. The difficulty arises not so much under the substantive law as under the procedure to be adopted. Under the Hindu Law, it is now well settled by the decisions that the creditor, provided that the debt is not illegal or immoral, can proceed against the separated interest of the sons of a Hindu father governed by the Mitakshara Law, if it was contracted by him when he was joint with them although they may be his personal debts, even though the sons may have been separated from their father at time of their enforcement. All the previous authorities on this point will be found collected and discussed in *Subramanya Aiyar* v. *Sabapathy Aiyar*[1] and *Annabhat Shankarbhat* v. *Shivappa Dundappa*[2]. The question presents no difficulty if in such a case the sons are also made parties to the suit along with their father because then they will have to put forward all their defences and their divided shares in the joint family properties will be liable to be attached and sold in execution of the decree if one is passed against them in the suit.

Complex questions arise only when the sons are not made parties to the suit against the father on his personal debts. In such cases if the father and the sons continue to be joint at the date of the decree and the execution proceedings, the sons' interest in the properties can be proceeded against in execution as they are properties over which the father who is the judgment-debtor has a disposing power for his own benefit at the time of execution within the meaning of S. 60 of the Civil Procedure Code. *(Nunna Setti*

1. (1927) 54 M.L.J. 726: I.L.R. 51 Mad. 361 (F.B.),
2. (1928) I.L.R. 52 Bom. 376,

v. *Chidaraboyina*[1] and *Jagabhai Lalubhai* v. *Bhukandas Jagivandas*[2].)

If, however, after the decree but before execution the father and sons separate, difficulties arise in enforcing the liability against the sons' separated properties. It has been held that on foot of the decree against the father as a judgment-debtor a suit can be instituted against the sons to which they can put forward defences not only that the original debt was illegal or immoral but as held recently that it did not exist at all in fact. (*Periaswami Mudaliar* v. *Seetharama Chettiar*[3] and *Lakshmadu* v. *Ramudu*[4]. *See also* Mayne's Hindu Law, 10th Edition, page 431 footnote.) When, however, the decree is sought to be executed against the sons' divided properties, the first question that arises is whether it is property over which the father has still a disposing power under S. 60 of the Civil Procedure Code. It is clear that the father cannot privately sell the sons' divided properties after the partition for his personal debts. Then the Courts cannot attach and sell those properties by virtue of the father's disposing power. Consequently, the properties cannot be sold in execution of the decree obtained against the father alone when he was joint. This is the view held in *Jainarayan Mulchand* v. *Sonaji*[5], *Thirumalamuthu Adaviar* v. *Subramania Adaviar*[6], *Kuppan Chettiar* v. *Masa Goundan*[7]. *Subramanya Aiyar* v. *Sabapathi Aiyar*[8]. The contrary view has been held in *Kishan Sarup* v. *Brijraj Singh*[9], *Venkatanarayana Rao* v. *Venkatasomaraju*[10], *Jawaharsingh* v. *Parduman Singh*[11], *Nand Kishore* v. *Madan Lal*[12], and also the case now under review. This view has been variously based on the fact that the father in such a suit represents the sons also and on the ground that the partition without making some provision for the binding debts is fraudulent and can be ignored. So far as the first ground is concerned it is difficult to see how in a suit against the father on his personal debt he can be said to represent the sons as well and they are as much parties to the suit as the father himself as observed in *Venkatanarayana Rao* v. *Venkatasomaraju*[10]. In the first place, the causes of action against the father and the sons are distinct.

1. (1902) I L.R. 26 Mad. 214, at p 222 and 223.
2. (1886) I.L.R. 11 Bom. 37 at 41.
3. (1903) 14 M.L.J. 84: I.L.R. 27 Mad. 243 (F.B.).
4 (1939) 50 L.W. 472.
5. I.L.R. (1938) Nag. 136: A.I.R. 1938 Nag. 24.
6 (1937) 1 M L.J. 243.
7. (1937) 1 M.L.J. 249: I.L.R. (1937) Mad. 1004.
8. (1927) 54 M.L.J. 726: I.L.R. 51 Mad. 361 (F.B.).
9. (1929) I.L.R. 51 All. 932.
10. (1937) 2 M.L.J. 251: I.L.R. (1937) Mad. 880 (F.B.).
11. (1932) I.L.R. 14 Lah. 399, 12. A.I.R. 1936 Lah. 64.

The father is sued on his contract with his creditor and not on any principle of pious liability while the son is liable on his pious liability to pay his father's debts and not on the contract. Again if the sons are also treated in law as parties to such a suit, it is difficult to see how they can in execution set up the plea of illegality or immorality of the debt which has ripened into a decree against themselves as parties. It is also difficult to reconcile this position with the son's right to question the existence of the original debt merged in the decree in a later suit as pointed out in *Lakshmadu* v. *Ramudu*[1]. If they should be treated as having been parties to the suit against their father, no separate suit can be brought against them on the judgment as observed in *Periaswami Mudaliar* v. *Seetharama Chettiar*[2], but there can only be execution of the decree against them. *Cf.* S. 47 of the Civil Procedure Code. Reliance has been placed for the view that the sons must be deemed to be parties to the suit against the father on the observations of their Lordships of the Privy Council in *Lingangowda* v. *Basangowda*[3]. That was the case of a manager suing for the properties of the joint family and there can be distinctness of the cause of action for the manager and the other members in such a case and their Lordships applied explanation 6 to S. 11 of the Civil Procedure Code. They do not therefore seem to help the present case.

The other basis adopted in *Bankey Lal* v. *Durga Prasad*[4], that the partition is not *bona fide* because it did not provide for the binding debts and can therefore be ignored in execution has been criticised adversely in *Atul Krishna Roy* v. *Lala Nandanji*[5], *Thirumalamuthu Adaviar* v. *Subramania Adaviar*[6] and *Kuppan Chettiar* v. *Masa Goundan*[7]. It must also be observed that the point raised in *Bankey Lal* v. *Durga Prasad*[4] has been differently answered by the Full Bench of the Madras High Court in In re *Balusami Aiyar*[8].

Cases also arise frequently where the father and sons separate when the suit is pending against the father alone and a decree is afterwards passed against the father. The question is whether such a decree is executable against the sons' shares obtained in the partition. One view to take in such cases is that the father's right to represent his sons when joint ceased on the partition and the suit

1. (1939) 50 L.W. 472.
2. (1903) 14 M.L.J. 84: I.L.R. 27 Mad. 243 (F.B.).
3. (1927) I.L.R. 51 Bom. 450.
4. (1931) I.L.R. 53 All. 868.
5. (1935) I.L.R. 14 Pat. 732: A.I.R. 1935 Pat. 275 (F.B.).
6. (1937) 1 M.L.J. 243.
7. (1937) 1 M.L.J. 249: I.L.R. (1937) Mad. 1004.
8. (1928) 55 M.L.J. 175: I.L.R. 51 Mad. 417 (F.B.).

thereafter must be taken to be against him alone and the decree cannot therefore be executed against the sons' shares. This is the view taken in *Kishan Sarup* v. *Brijraj Singh*[1] and *Atul Krishna Roy* v. *Lala Nandanji*[2] and also by Mr. Ananthakrishna Aiyar, J., in *Subramanya Aiyar* v. *Sabapathy Aiyar*[3]. *See also* Mayne's Hindu Law, 10th Edition, page 438. In this respect the case may be likened to a suit against a trustee or executor or karnavan of a Malabar tarwad who has been removed since the institution of the suit and can no longer represent the estate. The other view that has been taken is that as the father was sued in his representative capacity and this implies that the sons are also parties to the suit though not *eo nomine* on the record and that by any subsequent partition between the father and sons, the latter cannot cease to be parties to the suit and that consequently the decree would be executable against the sons' separated shares as well. This view found favour with the learned judges in *Venkatanarayana Rao* v. *Venkatasomaraju*[4].

The learned judge in the case under review has adopted another view that though the decree is binding on the sons, if their shares have to be proceeded against in execution, they should be added as parties in the execution. With all respect, it is difficult to see that if they are already taken to be parties to the suit, though not *eo nomine*, notwithstanding the partition between the father and the sons, they will not cease to be parties in the execution or have to be brought on record once more in execution.

On the Civil Procedure Code, as it stands it must be admitted that all these anomalies will be avoided if the view put forward in *Jainarayan Mulchand* v. *Sonaji*[5], *Thirumalamuthu Adaviar* v. *Subramanya Adaviar*[6] and *Kuppan Chettiar* v. *Masa Goundan*[7] is adopted. But this view places unnecessary restrictions in the way of the creditor working out his rightful claims against the sons' shares and this has led the judges in finding ways and means to prevent the debtors circumventing their creditors' just rights by effecting a partition and delaying the creditors, if not also depriving them of their rights under the substantive law. The more satisfactory method will be to amend the Civil Procedure Code suitably to meet such cases and not make the procedure uncertain by the conflicting judicial decisions.

1. (1929) I.L.R. 51 All. 932.
2. (1935) I.L.R. 14 Pat. 732: A.I.R. 1935 Pat. 275 (F.B.).
3. (1927) 54 M.L.J. 726: I.L.R. 51 Mad. 361 (F.B.).
4. (1937) 2 M.L.J. 251: I.L.R. (1937) Mad. 880 (F.B.).
5. I.L.R. (1938) Nag. 136: A.I.R. 1938 Nag. 24.
6. (1937) 1 M.L.J. 243.
7. (1937) 1 M.L.J. 249: I.L.R. (1937) Mad. 1004.

THE
MADRAS LAW JOURNAL

I] APRIL [1940

PREAMBLES OF CONSTITUTIONS AND CONSTITUENT ASSEMBLY

BY

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Meaning of the word "preamble"

The word "preamble" is derived from the root "proe", before and "ambulare" to go and means a preceding or introductory fact or circumstance, a preliminary, especially, one betokening that which follows, a presage, a prognostic. In its special sense it signifies an introductory paragraph or part in a statute, deed or formal document, setting forth the grounds and the intent of it.

Preambles in conveyancing

In a conveyance, after the names of the parties between whom the indenture is made are mentioned, there comes the preamble of the deed setting forth the intent of the document in the following words:

> "Whereas the said *A.B.* hath agreed with the said *C D.* for the absolute sale to him of the premises, lands, and hereditaments described in schedule hereto annexed at or for the price, etc."

These words determine the nature of the whole document. In case of ambiguity, it is this introductory part that furnishes the key to the construction of the whole document.

Preambles in the Acts of Legislatures

In regard to statutes, the term preamble is particularly applied to the opening paragraph, which summarises the intention of the legislature in passing the measure. A preamble is not a part of the Act itself but a mere recital. It may legitimately be consulted, for the purpose of solving any ambiguity, or of fixing the meaning of words, or of keeping the effect of the Act within its real scope, whenever the enacting part is in any of these respects open to

doubt. The preamble cannot either restrict or extend the enacting part, where the language and the object and the scope of the Act are not open to doubt. It is a settled rule, that the preamble cannot be made use of to control the enactments themselves when they are expressed in clear and unambiguous terms. In discussing the question whether a preamble is at all necessary, Halsbury[1] has stated:

"An ancient philosopher thought he could make the law clear by a preparatory account of what it was intended to effect; but modern ideas rather point to plain enactment and desire to omit preamble altogether. Bacon undoubtedly favours the modern view that law should commence with enactment..... It may be that Bacon had in his mind what another judge expressly said: that the preamble might act as the "key" of the statute to explain its object, and thereby elucidate its meaning. . . . The difference was between the speculative Greek philosopher and the practical lawyer and man of the world, but the controversy whether the laws should *incipere a jussione* or whether they should have an expository, though not perhaps a hortatory, preamble is not settled yet."

Generally the practice of prefacing every Act of legislature with a preamble has however, continued till now.[2]

Language of the preamble

A statute as well as its preamble are usually in the mother tongue. The Irish Free State, while framing its present constitution together with the preamble, employed both the Irish and the English languages.

Parliamentary practice of discussing the preambles of some bills last and not first

The parliamentary practice of discussing the preamble differs according to the nature of the bill—public, hybrid or private.[3]

As regards public bills in the Lords, the first proceeding of the Committee is to postpone discussion of the title which is there treated as a part of the bill. The preamble is postponed next. In the Commons, by Standing Order No. 35, the preamble stands postponed until after the consideration of the clauses without question put. This practice is adopted because the House has already affirmed the principle of the bill on second reading, and it is therefore the province of the Committee to settle the clauses first and then to consider the preamble in reference to the clauses. The preamble is thus made subordinate to the clauses instead of governing them. It is only after all the clauses and schedules have

1. Halsbury's Laws of England, Vol. 1, Introduction, pp. ccxci-ccxcii.

2. Maxwell on the "Interpretation of Statutes", 6th Edition, Ch. 1, p. 77, foot-note (*c*).

3. May on "Parliamentary Practice", 13th Edition 1924, pp. 402, 411, 417, 388, 767, 784, 787, 792, 794.

been agreed to and any new clauses or schedules added, that the preamble is considered and if necessary is amended. And the Chairman puts the question "that this be the preamble of the bill." In the Lords, the title of the bill is considered last and agreed to. And in the Commons, any amendment that may be necessary is then made to the title. Where a bill has no preamble, it will be out of order to move one. If an amendment is proposed to the bill to leave out the preamble or any clause of the bill, the question is put that "the preamble or such clause stand part of the bill." Under Standing Order No. 40, when a bill is brought up on report, the House should proceed at once to consider the clauses of the bill, without general discussion of the bill as a whole. The preamble should therefore be considered as a clause and the discussion thereon should be as much confined to it, as if the clause was under discussion.

A Select Committee on a *hybrid bill* differs from one on a public bill, as the former has the same power over the bill as a committee on private bills has and decides the question whether the preamble of the bill is proved before proceeding with the clauses.

The Committee on *unopposed private bills* consider the preamble and all the provisions of a bill referred to them and take care that they conform to the Standing Orders. Even if there are no opponents of the bill before the Committee, the promoters have to prove the preamble to the satisfaction of the Committee by the production of necessary evidence and by such explanation as may be required of them. If it should appear that the bill ought to be treated as an opposed bill the Chairman reports his opinion and the bill is dealt with accordingly. Unlike the practice in regard to the public bills, the preamble of a private bill is first considered; and if the *preamble (to the Private Bill) be opposed* counsel addresses the Committee more particularly upon the expediency therefor and then calls witnesses to prove every matter which will establish the allegations contained in the preamble. The witnesses may be cross-examined by counsel appearing in support of the several petitions against the preamble. When the arguments and evidence upon the preamble have been heard, the room is cleared and a question is put "that the preamble has been proved" which is resolved in the affirmative or the negative as the case may be. In the case of an omnibus bill or a bill for the authorisation of several separate undertakings, it is usual to prove the preamble in sections. After hearing the evidence the Committee may announce that they consider the finance of the bill so unsatisfactory that on grounds of public policy, the preamble should be held not proved. The Committee will then report to the House that the preamble

has not been proved; or the Committee may make alterations in the preamble, subject to the same restrictions as in the case of other amendments, *viz.*, that nothing be introduced inconsistent with "the order of law" or with the Standing Order of the House applicable to the bill. Such amendments are to be specially reported.

Preambles of Constitutions

The term 'Constitution' has been defined as a system or body of fundamental principles according to which a nation, a state or body politic is constituted and governed. It may be embodied in successive concessions on the part of the sovereign power implied in long-accepted statutes or established gradually by precedents as in the British constitution, or it may be formally set forth in a document framed and adopted on particular occasions by the various orders or members of the Commonwealth or their representatives as in the constitution of the United States of America. Constitutions may be rigid or flexible. They may also be written or unwritten. In the case of written Constitutions, the name is sometimes applied to the document embodying it. In either case it is assumed or specifically provided that the constitution is more fundamental than any particular law and contains the principles with which the preamble on the one hand and all legislation on the other must be in complete harmony.

Relation of preambles to Constitutions

Preambles and statutes are closely knit together for the fulfilment of the ideals of good government or self-government as the case may be. Coke has said that the preambles of statutes are as it were the keys to the understanding thereof.

So if one wants to approach the study of statutes one has first to make a close acquaintance with their preambles. A study of the latter is rendered necessary to reveal to us the true nature of their constant companions, the constitutions.

There can never be a constitution of one kind having a preamble of a different kind. Manu has very aptly described the above principle in the following lines:—

"अन्यदुप्तम् जातमन्यदित्येतन्नोपपद्यते
उप्यते यद्धि यद्बीजं तत्तदेव प्ररोहति ।[1]

"It is never found that one thing is sown and another grown; the seed that is sown puts forth its own offshoots."

Preambles as ideals

The preambles of constitutions represent the ideals set forth by the nations that seek to achieve their purpose through the

1. Manu Smruti, Chapter 9, Verse 346.

enactment of the various statutes. The ideals though often similar are expressed in different words in different countries. Some preambles are for securing the blessings of liberty (as in America); some for maintaining the honour of the country (as in Switzerland); some for restoring national life and unity (as in Ireland); others are for establishing a realm of justice and freedom and for furthering the cause of peace and social progress (as in Germany); still others for the inclusion in Union under the Crown. A few are actuated by the spirit of democracy while others stand for the dignity of labour and still others (as in Russia) aim at abolishing for ever the division of society into classes and suppressing all exploitation of man by man.

Preambles of the constitutions of the republican countries:

Esthonian republic

After the armistice of November, 1918, the Provisional Government functioning in Esthonia proceeded to arrange for the election of a Constituent Assembly in the place of the National Council which had come into being then. On May 19th the Constituent Assembly confirmed the National Council's decision that Esthonia should be an independent Republic and on June 4th it adopted a provisional constitution pending the framing of the final constitution. The task of drafting was entrusted to a committee of the members of the Constituent Assembly. This Constituent Assembly was dissolved in December, 1920 and according to the new constitution the State Assembly met on 4th January, 1921. The constitution of the Esthonian Republic is remarkable alike for its simplicity and brevity. The preamble to the constitution adopted by the Constituent Assembly on 15—6—1920, is as follows:—

"The Esthonian people with unshaken faith, and the resolute will to create a state based on justice, law and liberty, to maintain internal and external peace for the general well being and to guarantee the social progress of the present and future generations, has framed the following constitution which has been adopted by the Constituent Assembly."

In *Czechoslovak Republic*, the Constituent Assembly met for the first time on November 14th, 1918 and immediately declared the Czechoslovak State as a democratic Republic. An executive was also created responsible to the Assembly. During the following year this Constituent Assembly was occupied with the task of debating the constitution put before it by the executive. The task of framing the constitution was accomplished on 20th February, 1920. The preamble ran as follows:—

" We, the Czechoslovak Nation, desiring to consolidate the perfect unity of our people, to establish the reign of justice in the Republic, to assure the peaceful development of our native Czechlosovak land, to contribute to the common welfare of all citizens of this State and to secure the blessings of

freedom to coming generations, have in our National Assembly this 29th day of February, 1920, adopted the following constitution for the Czechoslovak Republic; and in doing so we declare that it will be our endeavour to see that this constitution, together with all the laws of our land, be carried out in the spirit of our history as well as in the spirit of those modern principles embodied in the idea of self-determination, for we desire to take our place in the family of Nations as a member at once cultured, peace-loving, democratic and progressive."

The present Constitution of the United States of America was first drafted in a convention held on 25th May 1787 of which George Washington was the President. It was decided that this constitution should be referred to the people themselves in each of the States and not to the Congress or to the legislatures of the Colonies. This Convention thereupon became a Constituent Convention distinguished from a Constituent Assembly, for the purpose of convenience, by the fact that it would not of its sovereign right, prescribe a constitution, but would only refer it when drafted to the sovereign bodies or the sovereign peoples which it represented. The convention consisted of 55 delegates. It continued to sit until September 17th, 1787, when 39 delegates signed the constitution which had been drafted and sent it forward to the Congress. The Congress on September 28th, 1787, directed the constitution so drafted together with the resolution and a covering letter from the President:

"To be transmitted to the several legislatures in order to be submitted to a convention of Delegates chosen in each State by the people thereof, in conformity to the resolves of this Convention."

The preamble of the Constitution of the United States of America, 1787, is as follows:—

"We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish the Constitution for the United States of America."

In the Swiss Confederation, the two chambers of the legislature in 1874, caused the earlier Constitution of 1848 to be revised. A new draft Constitution was passed by them for submission to a referendum of the people. The preamble of the Federal Constitution of the Swiss Confederation of the 29th May, 1874, as revised up to the end of June, 1921, is as follows:—

"In the name of Almighty God, the Swiss Confederation resolved to consolidate the alliance of the confederated members and to maintain and increase the unity, strength and honour of the Swiss nation has adopted the Federal Constitution."

In the Act framing a constitution for the *Irish Free State* (*Saorstat Eireann*) and implementing the Treaty between Great Britain and Ireland signed at London on the 6th day o

December, 1921—The Constitution of the Irish Free State (Saorstat Eireann) Act, 1922 (No. I of 1922)—the preamble runs as follows:—

"Dail Eireann sitting as a Constituent Assembly in this Provisional Parliament, acknowledging that all lawful authority comes from God to the people and in the confidence that the National life and unity of Ireland shall thus be restored hereby proclaims the establishment of the Irish Free State (otherwise called "Saorstat Eireann").

and in the exercise of undoubted right, decrees and enacts as follows.

In Germany, the National Assembly, or Reichsversammlung, by which the Weimar Constitution was devised, met on 6th February, 1919, in the historic threatre at Weimar. Its first act was to create a temporary constitution of the Reich. The Provisional Government, resigned all authority to the National Assembly, acknowledging it as the highest and only Sovereign in Germany. Thus the way for the creation of the permanent Constitution by the National Assembly was made clear. A new draft was submitted to the National Assembly as a Ministerial Bill. This draft so revised was placed before the National Assembly for its consideration on 21—2—1919. It was referred to a special committee of 28 members who were appointed for the purpose of examining it in detail and reporting to the Constitutent Reichstag. Ultimately the new Reich Constitution was adopted on the 31st July, 1919. It was decided that instead of dissolving the Constituent Assembly it should itself become the first Reichstag under the Constitution both to save the confusion of further election and to enable legislation consequent upon the Constitution to be proceeded with without delay. With characteristic industry all the Constitutions of the world were ransacked, particularly constitutions such as the Swiss, which were both republican and federal. It proved, in the result, that the dratters had to look not abroad, but within the country; and they turned to the valuable work done by the Assembly that met in Frankfort in 1849.

The Weimar Constitution is in great part based upon, and indebted to the work of, these original founders of unity, who had to wait long before it could bear fruit. The preamble of the Constitution of the German Reich of 11th August, 1919, ran as follows:—

"The German people, united in every branch and inspired by the determination to renew and establish the realm in freedom and justice, to be of service to the cause of peace at home and abroad, and to further social progress has given itself this Constitution."

The first Constituent Assembly in Russia was dissolved on 18th January, 1918, on the very day when it first assembled. In spite of

the attacks from within and without the Bolsheviks remained in control of the country. They arranged to substitute their own Constituent Assembly for the Assembly which they had dissolved. On 18th January, 1918, the Third All-Russian Congress of Soviets met and adopted "the declaration of the rights of the working classes" which forms Part 1 of the present Constitution. The Fifth Congress, at its sitting on 10th July, 1918, adopted the present full Constitution. The preamble of the Constitution (Fundamental Law) of the Russian Socialist Federal Soviet Republic Decree of the Fifth All-Russian Congress of Soviets, adopted on July 10th, 1918, runs as follows:—

"With a fundamental aim of suppressing all exploitation of man by man, of abolishing for ever the division of society into classes, of ruthlessly suppressing all exploiters and of establishing the triumph of socialism in all countries, the Third All-Russian Congress of Soviets further decrees etc.

One of the epigrams of Naschokin, who was the Chancellor in the reign of Emperor Alexis of Russia in year 1600, was "Better than strength is thought; let us sell our soldiers and buy a man of thought."[1] The Russians would have very little thought then, that the man of thought whom their *descendants* would follow would be a man from Germany—Karl Marx—who like several other prophets has been honoured in countries other than his own.[2]

Preambles relating to the Constitutions of Monarchies:
Belgium

The preamble of the Constitution of the Kingdom of Belgium, 1921, is as follows:—

1. Wigmore's Panorama of the World's Legal Systems, Vol. 2, pp. 786-787.

2. Following is a table, giving at a glance the year of the Constitutions of various countries prepared by the Constituent Assemblies or The National Assemblies:—

	Country.	Year.	
1.	The Union of South Africa,	1909.	Constituent Convention.
2.	The United States of America	.. 1787.	
3.	The Commonwealth of Australia	.. 1909.	
4.	The Kingdom of Belgium	.. 1830.	
5.	The Kingdom of Denmark	.. 1849, 1915.	
6.	The Esthonion Republic	.. 1920.	
7.	The French Republic	.. 1871, 1875.	
8.	The German Reich	.. 1919.	"Reichsversammlung."
9.	The Irish Free State	.. 1922.	
10.	The United States of Mexico	.. 1856, 1917.	
11.	The Russian Socialist Federal Soviet Republic	.. 1918,	
12.	The Kingdom of the Serbs, Croats, and Slovenes	.. 1835, 1920.	"Skupshtina."

"In the name of the Belgian people the National Congress enacts this Constitution."

Sweden:—The following is the preamble of the Constitution of the Kingdom of Sweden:

"We, the estates of the Swedish kingdom, counts, barons, bishops, nobles, clergy, burghers, and peasants, assembled in general session on our own behalf and on behalf of our brethren at home, publicly declare that, whereas we the deputies of the Swedish people have gained the opportunity of improving the condition of our country through the establishment of a revised Constitution in consequence of the recent change of government to which we have given our unanimous consent, we do hereby repeal the fundamental laws which have been more or less in force up to this time, *viz.*, the Constitution of August 21, 1772, the Act of Union and Securities of February 21st and April 3rd, 1789, the Riksdag ordinance of January 24, 1617, and all other such old or new laws, acts, ordinances, enactments or resolutions as have heretofore gone under the name of fundamental laws; and we do hereby make known the adoption of the following Constitution for the Swedish Kingdom and its dependencies, which from henceforth shall be the foremost fundamental law of the land, reserving to this Diet the right to adopt in the manner herein prescribed, the other fundamental laws mentioned in Art. 85 of this Constitution."

England:—*The preamble to the Statute of Westminster,* 1931 (*22 Geo. V.*, c, 4) has assumed importance now-a-days from the Indian point of view. It runs as follows:—

"Whereas it is meet and proper to set out by way of preamble to this Act that in as much as the Crown is the Symbol of the free association of the members of the British Commonwealth of Nations as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom.

And whereas it is in accord with the established constitutional position thot no law hereafter made by the Parliament of the United Kingdom shall extend to any of the Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion.

And whereas it is necessary for the ratifying, confirming, and establishing of certain of the said declarations and resolutions of the said conferences that a law be made and enacted in due form by authority of the Parliament of the United Kingdom.

And whereas the Dominion of Canada, the Commonwealth of Australia the Dominion of New Zeland, the Union of South Africa, the Irish Free State and Newfoundland have severally requested and consented to the submission of a measure to the Parliament of the United Kingdom for making such provision with regard to the matters aforesaid as is hereafter in this Act contained.

Now, therefore, be it enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled and by the authority of the same as follows:—"

This statute is a very important document in the constitutional history of the British Empire. The recitals in the first part of the preamble do not find a place in the enacting clauses of the Act. In other respects also this preamble is rather unique.[1] The statute was passed in 1931 to give effect to the resolutions of the Imperial Conferences of 1926 and 1930. The Imperial Conference of 1926 described the position and mutual relations of the group of self-governing countries composed of Great Britain and the Dominions. It said:

"They are autonomous countries within the British Empire, equal in status, in no way subordinate one to another in any aspect of domestic and external affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations."

Progress in constitutional development has been rapid in the Dominions since Lord Durham made his famous report on Canada nearly a century ago and enunciated the principles of responsible Government. In introducing the Federal scheme for Canada in 1865, Sir John MacDonald observed in the course of his speech:

"One argument, but not a strong one, has been used for the Federation that it is an advance towards complete independence. Some are apprehensive that the very fact of our forming this Union will hasten the time when we shall have severed ourselves from the Mother Country. I have no apprehension of that kind. I believe it will have the contrary effect."

The report of the Inter-Imperial Relations Committee in 1926 showed that there still remained, both in practice and in law, certain forms and machinery forming part of the old system of centralised control over the Dominions which had become obsolete. In 1929, the Special Commmittee on the operation of Dominion legislation completed the work of investigation and its report was adopted by the Imperial Conference of 1930. The recommendations were designed both to carry into full effect the root principle of equality of status and to indicate measures for maintaining and strengthening the system of free co-operation. The Bill which resulted in the Statute of Westminster came forward with the express approval of all the Dominion Parliaments. Thus the above preamble has to be read in the light of the above historical facts.

Preambles of the Constitutions of the Dominions

The South Africa Act, by which the Imperial Parliament prescribed the South African Constitution, was passed in 1909. This constitution granted all powers, save in one or two small matters, to the Dominion, and so reduced the federating

1. "The Law of Indian Constitution" (by M. Ramaswamy, Advocate, Mysore High Court) Introduction, p. 23.

states to the position of administrative provinces. *The preamble of South Africa Act,* (9 Edwad vii, Ch. 9) runs as follows:—

"Whereas it is desirable for the welfare and future progress of South Africa that the several British Colonies therein should be united under one Government in a legislative union under the Crown of Great Britain and Ireland; And whereas it is expedient to make provision for the Union of the Colonies of the Cape of Good Hope, Natal, the Transvaal and the Orange River Colony on terms and conditions to which they agreed by resolution of their respective Parliaments, and to define the executive, legislative, and judicial powers to be exercised in the government of the Union; And whereas it is expedient to make provision for the establishment of provinces with powers of legislation and administration in local matters and in such other matters as may be specially reserved for provincial legislation and administration; And whereas it is expedient to provide for the eventual admission into the Union or transfer to the Union of such parts of South Africa as are not originally included therein: Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—"

The Commonwealth of Australia was created by a Constitution passed by the Imperial Parliament in 1900. The preamble to the Commonwealth of Australia Constitution Act (63 & 64 Vic., Ch. 12) is as follows:—

"Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established: And whereas it is expedient to provide for the admission into the Commonwealth of other Australian Colonies and possessions of the Queen: Be it therefore, etc."

The British North America Act enacts the Canadian Constitution. It provided not only a Federal Constitution for the Dominion of Canada, but made constitutional provision for the government of the Provinces which came into the Federation. Under the Constitution specific legislative powers were given to the Constituent States, and the residuary powers were left to the Federal Parliament. In many matters Canada had reacted from the procedure of the United States. In 1867 Canada was given the constitutional status of a colony, whereas at the present time she exercises the constitutional usage of sovereign nationhood. The preamble of the British North America Act, 1867, is as follows:—

"Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom; And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire; And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Con-

stitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared; And whereas it is expedient that Provision be made for the eventual admission into the Union of other Parts of British North America; Be it therefore enacted, etc."

Preamble of the Government of India Act, 1935.

The present Government of India Act is the lengthiest of all the Government of India Acts. The Act has no preamble but it is to be read with the preamble of the Government of India Act of 1919, as laid down in S. 321, proviso (*a*) of the present Government of India Act. It runs as follows:—

"Whereas it is the declared policy of the Parliament to provide for the increasing association of the Indians in every branch of Indian Administration and for the gradual development of self-governing institutions with a view to the progressive realisation of responsible government in British India as an integral part of the Empire; And whereas progress in giving effect to the policy can only be achieved by successive stages and it is expedient that substantial steps in this direction should be taken; And whereas the time and manner of each advance can be determined only by the Parliament upon whom responsibility lies for the welfare and advancement of the Indian people; And whereas the action of the Parliament in such matters must be guided by the co-operation received from those on whom new opportunities of service will be conferred and by the extent to which it is found that confidence can be reposed in their sense of responsibility; And whereas concurrently with the gradual development of self-governing institutions in the Provinces of India it is expedient to give to those provinces in Provincial matters the largest measure of independence of the Government of India which is compatible with due discharge by the latter of its own responsibilities; Be it therefore enacted by the King's Most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled and by the authority of the same as follows:—"

The preamble of the future constitution of India will depend upon whether dominion status or independence is to be the goal. In the former case, in view of the recent declaration of the Viceroy, we will have to look to and study the preamble of the Statute of Westminster, 1931. If necessary the preamble will have to be improved upon and made use of. Lord Zetland has quite recently announced that India's secession from England will not be allowed though according to the Viceroy's declaration India will be given a constitution in the terms of the Statute of Westminster, 1931.

If independence is taken as the goal, a preamble of the following type will suffice:

"We believe that it is an inalienable right of the Indian people as of any other people, to have freedom and to enjoy the fruits of their toil and have the necessities of life, so that they may have full opportunities of growth."

Demand for Constituent Assembly

The question as to who is to determine the future Constitution of India has become a matter of very great importance. On the one hand it is said that it is the British Parliament alone that can authoritatively decide the question, while the Congress insists upon its being decided by the Indian people. And for that, the machinery of the Constituent Assembly is proposed. It is urged by the Viceroy that there should be a Representative Committee for the present as a provisional measure. Mr. Patel has suggested a body composed of all the members of legislatures in the provinces. Others have improved upon it and suggested that Representatives selected from the members of the legislatures would very well serve the purpose; while Mr. Gandhi is satisfied with any "Representative Assembly". A valid objection is however raised to the scheme of the members of all legislatures forming the Representative Assembly on the ground that those members cannot be truly representative as they had been elected on the basis of the present defective electoral system. Sir Maurice Gwyer on his part discounts the procedure of Constituent Assembly elected on a wide franchise, and advocates a meeting of a small number of delegates. Really speaking a Constitution based on general agreement and drafted by a few experts is the best. But who are to be these delegates forming a small meeting is a very difficult question to be solved. Mr. P. Kodanda Rao, in an article in the "Hitawada" (of Nagpur), supports the view of compulsory partnership and comes to the conclusion that even in the British Dominions, the Constitutions were the impositions of majorities on minorities and not agreed settlements and that the dissenting minorities ultimately reconciled themselves to the imposition of majority decisions. Mr. P. Kodanda Rao rightly remarks:

> 'To the extent that an imposed Constitution embodies a moral principle, such as democracy, to that extent the opposition to it will be weakened and the stronger the majority imposing the Constitution, the greater the chances of the minority reconciling to it."

From what has been written above, the importance of the study of preambles will be apparent. When every thing is in the melting pot, let us pray in the words of our Ancients.

* "पुरा प्रातरनुवाकस्योपाकरणाज्जघनेन गार्हपत्यस्योदङ्मुख उपविश्य स वासवम् सामाभिगायति ॥

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* Cchandogyopanishad, Adhyaya 2, Khanda 24, Shloka 4; Hume's Translation of the Upanishads.

लोकद्वारमपावर्णु

पश्येमत्वावयम्

रा (ज्ञम्) आज्यायो आ इति ॥ ४ ॥

Before the commencement of the morning litany, he sits down behind the Garhapatya Fire, facing the north, and sings forth the Saman to the Vasus:

"Open the door to thy people,
And let us see thee,
For the obtaining of,
The Sovereignty."

SUMMARY OF ENGLISH CASES.

CASWELL *v.* POWELL DUFFERYN ASSOCIATED COLLIERIES, LTD., (1940) A.C. 152 (H.L.).

Dangerous Machinery—Statutory duty to fence—Death of workman due to breach of statutory duty—Liability of employer—What employer should prove to escape liability.

Plaintiff as administratrix of her dsceased son's estate sued to recover damages on the ground that his death was caused by a breach of a statutory duty imposed upon the defendants to keep securely fenced dangerous parts of the machinery in the mine. The defendant to escape liability will have to prove *(i)* that it was not reasonably practicable to avoid or prevent the breach or *(ii)* that a contributory cause of death was the negligence of the deceased workman and on the facts the defendants having failed to prove either of these were liable for damages to the plaintiff.

Decision of the Court of Appeal in (1938) 3 All.E.R. 21 reversed.

DOVER NAVIGATION CO. *v.* ISABELLA CRAIG, (1940) A.C. 190 (H.L.).

Workmen's Compensation—Sailor dying of yellow fever while working in mosquito infested area—How far accident arising out of employment—Tests.

To hold that an accident *(death due to yellow fever while working in mosquito infested area)* arose out of the employment a certain degree of casual relation between that accident and the employment must exist. It is impossible exactly to define in positive terms the degree of that casual connection, but certain negative propositions may be laid down, for example, the fact that the risk is common to all mankind does not prove that the accident does not arise out of the employment. Nor can it be held that death or

injury from the forces of nature (for example, earthquake and lightning) is not, merely because the accident is due to the forces of nature, an accident arising out of employment. However it has to be shown that the workman was especially exposed by reason of his employment to the incidence of such force.

4 British Workmen's Compensation Cases 295 overruled.

MORRISON'S WILL TRUSTS, *In re*: WALSINGHAM *v.* BLATHWAYT, (1940) 1 Ch. 102.

Will—Clause for forfeiture of benefits in case legatee shall become or marry a Roman Catholic—If void as offending rule against perpetuities.

A clause in the will provided as follows:—"If either during my lifetime or after my death any legatee under my will including any person who shall benefit under this present clause shall be or become Roman Catholic or shall marry a Roman Catholic or shall give any promise or come under any obligation to bring up as a Roman Catholic any child of such legatee then and in every such case and as from the occurrence of such event such legatee shall absolutely forfeit and lose all benefits and powers given to him or her by my will..................and such interests shall fall into and form part of the residuary estate." Some legatees having become Roman Catholics, it was contended on their behalf that the clause of the will is void because it may operate at a point of time outside the period of time allowed by the rule against perpetuities.

Held, upon a true construction of the clause upon the hypothesis that the word ' legatee" includes every person who takes a benefit in legacy under the will, the clause is capable of being applied separately to the interests of that legatee and upon that footing if he is one of the persons who has done the prohibited act, and could only have done it within the perpetuity period, then as regards that person the condition is valid. On the facts there was held to be forfeiture.

EAVES, *In re*: EAVES *v.* EAVES, (1940) 1 Ch. 109 (C.A.).

Wills—Gifts to wife during widowhood—Remarriage of widow decreed a nullity—Effect.

The testator gave his wife a legacy and gave to her the use of a certain house and an annuity of £600 during her life or widowhood to be paid by the trustees. The testator died in 1919 and his widow remarried on September 24, 1925. A decree *nisi* of

nullity of that marriage was made on 24th May, 1937, and that decree was made absolute on 15th November, 1937, on the ground of incapacity of the husband to consummate the marriage. She then claimed the life interests as widow.

Held [affirming (1939) Ch. 1000], the material transaction in the present case was the handing over of the fund to the defendant as his own in anticipation that on 24th September, 1925, the widow would acquire the status of a married woman. When she married the transaction became complete and effectual and could not have been questioned in any Court at any time before the decree of annulment, and the annulment cannot have the effect of undoing or reopening such a transaction. In the circumstances of the present case the defendant was left by the widow to act and did in fact act on the view that the winding up of the trust was a completely legal transaction, leaving the funds in his hand as his own to spend and the plaintiff cannot subsequently question the legality of the transaction.

PROVENDER MILLERS (WINCHESTER), LTD. *v.* SOUTHAMPTON COUNTY COUNCIL, (1940) 1 Ch. 131 (C.A.).

Riparian owners—Alteration by County Council (under statutory powers) of a culvert over a river to provide outlet for flood-water—Liability for interference with and damage to right of millowner deriving water-power from river—Onus—Right of riparian owners to protect themselves against flooding—Extent.

The appellants, a County Council under their statutory powers, in altering a culvert over a river increased the size of the alveus of that portion of stream and also made an entirely new alveus to carry the water which had been running in the old stream. This had the effect not merely of protecting the appellant's land from flooding but also of diminishing the flow of water in the main stream thereby affecting the rights of the respondent a millowner deriving water-power from the river. In a claim by the respondent for injunction and damages,

Held, whether the stream be natural or artificial, the appellants are liable. The alteration cannot be described as the removal of an obstruction in a water course. As the appellants really made no attempt to discharge the burden upon them of showing that the statutory object of repairing the bridge and protecting the highway against flood could not reasonably have been achieved without permanently altering the normal flow of the river to the prejudice of riparian owners the appellants were liable.

Decision of Farwell, J., (1939) 3 All.E.R. 882 affirmed.

CAPON, *In re*, (1940) 1 Ch. 151.

Sale of goods—Auctioneers providing funds for purchase of pigs—Purchaser removing pigs after signing note acknowledging receipt of the pigs, that the pigs were auctioneers' property and could be removed and sold by them—Arrangement not registered as a bill of sale—Seizure and sale by auctioneers after bankruptcy of purchaser—Effect.

Auctioneers who had provided funds for purchase of pigs by a farmer (who before removing them signed a note acknowledging receipt of the pigs and stating that the pigs were the auctioneers' property and could be removed and sold by them,) on the bankruptcy of the farmer seized and sold the pigs and claimed to retain the sale proceeds against the trustees in bankruptcy. They contended that the farmer was an agent in the purchases at the auctions and the arrangement was to give them a security.

Held, as between the vendors and the farmer the farmer was not an agent of the auctioneers and the property in the pigs passed to him and the arrangement not being registered as a bill of sale created no charge and the auctioneers must account to the trustee in bankruptcy for the proceeds of sale.

SELWOOD *v.* TOWNLEY COAL AND FIRECLAY CO., (1940) 1 K.B. 180 (C.A.).

Workmen's compensation—Receipt of half wages during disablement under the statute—Effect on right to damages under common law.

Where a workman has received half wages during his period of disablement as compensation under the statute,

Held, following (1940) 1 K.B. 56, a judgment for damages in a commen law action in respect of the same accident cannot be passed against an employer who has paid compensation under the statute. The result is the same even where the workman has not received the whole compensation and has received only a small portion.

HEWITT *v.* BONVIN, (1940) 1 K.B. 188 (C.A.).

Negligence—Father's motor car driven by son for latter's purposes—Death of passenger on account of negligent driving—Father whether liable as master or principal.

The son wanted to use his father's car solely for his own purposes—to drive *H* and two girl friends of theirs. He took the car with the permission of his mother who however did not know the purpose. The mother had authority from the father who was absent from town to give permission. When returning, through

negligent driving the car was overturned and *H* was killed. In an action by the administrator of the deceased for damages,

Held, on the facts that the son was not the agent or servant of the father. It is merely the loan of a chattel to be used for the son's own purposes and the father is not liable.

GRIGGS *v.* PETTS, (1940) 1 K.B. 198 (C.A.).

Practice—Costs—Payment of money by defendant into Court—Plaintiff asking for leave to take out money in satisfaction of claim at the time of hearing—Proper order as to costs—Discretion of Court—Appealability—R.S.C., O. 22, R. 3.

Plaintiffs claimed damages for injuries sustained by reason of the negligent driving by defendant of a motor car. Defendant paid into Court a certain amount, but, denying liability. When the case was taken up for trial, plaintiff said he would take out the money which was in Court and asked for the usual order. The order was made without providing for costs of defendant after the payment into Court. On an appeal by defendant,

Held, the order under appeal was not one for costs only and the appeal was competent. The Judge has a discretion which is subject to appeal. The order for payment out, should not have been made without providing for costs incurred by defendant after the date of payment into Court.

STEVENS *v.* TIRARD, (1940) 1 K. B. 204 (C.A.).

Income-tax—Finance Act (1920), S. 21—Payment of money to wife on condition that she is only bound properly to maintain the children—If income of child in his own interest.

By an order of the Divorce Court the husband was ordered to pay his wife who divorced him certain sums in excess of £50 per annum for maintenance and education of the three children.

Held, it cannot be said that the child is entitled in his own right to money paid to his guardian for his maintenance. The money is not impressed with a trust, but is paid upon a condition and it is the mother's income.

(1939) 2 K. B. 410 affirmed.

WRINGE *v.* COHEN, (1940) 1 K. B. 229 (C.A.).

Nuisance—Premises adjoining highway—Passer by injured by collapse of wall—Liability of owner or occupier.

If owing to want of repair premises on a highway become dangerous and, therefore, a nuisance, and a passer-by or an adjoin-

ing owner suffers damage by their collapse, the occupier or the owner if he has undertaken the duty of repair, is answerable, whether he knew or ought to have known of the danger or not. On the other hand if the nuisance is created not by want of repair, but, for example, by the act of a trespasser, or by a secret and unobservable operation of nature, such as a subsidence under or near the foundations, neither an occupier nor an owner responsible for repair is answerable, unless with knowledge or means of knowledge he allows the danger to continue.

HAILE *v.* WEST, (1940) 1 K. B. 250 (C.A.).

Practice—Costs—Exercise of discretion contrary to the rules which have statutory sanction—Power of appellate Court to deal with the matter.

If the trial Judge has exercised his discretion as to costs contrary to the rules which have statutory sanction, then according to *Campbell* v. *Pollak*, [(1927) A. C. 732] and other well-known authorities, the Court of Appeal has ample powers to deal with the matter.

PETRIE *v.* MAC FISHERIES, LTD., (1940) 1 K. B. 258 (C.A.).

Master and servant—Right of servant to wages for period of absence during illness—Implied term excluding right.

Before the period of employment, a notice was put up by the employers in the place where the man worked, to the effect: "......the under-mentioned allowances will be made when men are absent:—During sickness: Half pay commencing from the first day's absence up to a total of 21 days per annum. No allowance after...These allowances are purely an "act of grace" and cannot be claimed as a "right"." In 1933, 1936 and 1937 the employee while sick and away from work did in fact receive this gratuity of half pay. In 1938 he was again ill and claimed full wages as of right.

Held, that the arrangement that when ill he was to take half pay, whether as of right or whether as a gratuity, negatives any presumption that he was working on the terms that he was to get full wages while he was temporarily sick.

Morrison v. *Bell*, (1939) 2 K.B. 187: (1939) 1 All. E. R. 145; explained.

SOWLER *v.* POTTER, (1940) 1 K. B. 271.

Lease—Lessee with previous conviction for allowing disorderly behaviour taking lease in a name to which she had hers changed

later—If lease can be terminated as void ab initio *on the ground of mistaken identity and concealment*

One Anna Robinson was convicted for allowing disorderly behaviour in her premises. As Ann Potter (to which her name was subsequently changed by deed poll), she took a lease of certain other premises for conducting a restaurant therein. The lessors on discovering her identity started proceedings to recover the premises and to have the lease declared void on the ground of mistaken identity and concealment.

Held, the case of a landlord and tenant is clearly a case where the consideration of the person with whom the contract was made is a vital element in the contract and therefore if there is a mistake with regard to the identity of the person with whom one is contracting the contract is void *ab initio* and the lessee is liable as if she was a trespasser.

AYRES *v.* MOORE, (1940) 1 K.B. 278.

Bills of exchange—Acceptance under mistake of fact—Effect on liability of acceptor—Fraud in procuring acceptance—Effect on rights of plaintiff who is not a holder in due course.

In a defence (by the acceptor) which seeks to repudiate liability upon a contract in a bill of exchange by reliance upon the allegation that such a contract was entered into under a mistake of fact it is necessary to show that the mistake was as to a fact affecting the liability, or at any rate fundamental to the transaction.

Aikin v. *Short,* (1856) 1 H. & N. 210 and *Morgan* v. *Ashcroft,* (1938) 1 K.B. 49, applied.

Where the bills when taken by the plaintiff were incomplete (as no name of drawer was inserted) and also the plaintiff was the original payee (in this case the drawer) the plaintiff is not a holder in due course and is not protected from the effects of the fraud in making defendant accept the bill and the defendant, having repudiated the obligation as soon as might be after the discovery of the fraud, is entitled to succeed.

THE KING *v.* THE RECORDER OF BOLTON: *Ex parte,* MC VITTIE, (1940) 1 K.B. 290 (C.A.).

Public Health Act (1936), S, 58—Order to execute works of repair or restoration—Specification of works if essential for validity of order.

Under the Public Health Act, 1936, S. 58 the owner of certain structures was ordered by the justices for the County Borough to execute such works of repair or restoration or if he so elected to demolish the structure and remove the rubbish as may be necessary for remedying the cause of the complaint;

The order was confirmed by the quarter sessions. On an order *nisi* for a writ of *certiorari* for quashing the order it was argued that the order was bad as it did not specify the works of restoration or repair.

Held, affirming [1939] 2 K.B. 98, S. 58 did not require specifications of the works to be given and the order was valid.

KENT *v.* EAST SUFFOLK RIVERS CATCHMENT BOARD, (1940) 1 K.B. 319 (C.A.).

Sea wall—Repair by statutory authority—Negligent delay in repairing—Damage to plaintiff's land by salt water—Liability.

In a claim for damages by the owner of pasture land which had been damaged by salt water owing to the negligence and delay of the statutory authority in carrying out the repairs to a sea wall,

Held (Slesser and MacKinnon, L. JJ., du Parcq, L. J., dissenting) a body having powers but no duties conferred by statute can be under no liability if damages arise to a person by the mere failure to exercise that power. But where such a body undertook and attempted to do that work under their powers and damage is caused by their incompetent exercise they are liable for damages for misfeasance as the plaintiffs were induced, to their detriment to rely upon the board's undertaking to do the work and themselves to abstain from doing it.

Per *du Parcq, L. J.*—A catchment board which is under no statutory duty to landowners within its area, is never liable to one of them either for a total neglect to exercise its statutory powers (or if no more is proved) for exercising them with a lack of efficiency or with too little zeal or dispatch.

STIMPSON *v* STANDARD TELEPHONES AND CABLES, LTD., (1940) 1 K.B. 342 (C.A.).

Master and servant—Dangerous machine—Employer failing to fence machine properly—Breach of statutory duty—Injury to infant workman—Receipt of compensation under Workmen's Compensation Act—When bar to common law right to damages.

The employers did not carry out their statutory obligation to fence a dangerous machinery and the plaintiff, an infant workman whose hand was caught in the machine suffered injury which would not have been caused, if the statutory duty had been performed. The father of the infant plaintiff had claimed and received compensation under the Workmen's Compensation Act. In a subsequent action under common law,

Held, the necessary casual connection is established between the negligence of the employer and the injury suffered by the plaintiff. The burden of proving contributory negligence was on the defendants.

In order that the payment under the Workmen's Compensation Act may have the necessary quality to operate as a discharge of the liability of the employer it must be paid and received as compensation under the Act. In the case of an infant the question as to the mental operation on the part of the recipient is to be decided on the test whether the receipt is for the infant's benefit. On the facts the receipt of compensation by the father was not for the infant's benefit and that cannot bar any action at common law.

COMPAGNIE PRIMERA DE NAVAGAZIONA PANAMA *v.* COMPANIA ARRENDATARIA DE MONOPOLIO DE PETROLEOS S. A. (1940) 1 K.B. 362 (C.A.).

Shipping—Charterparty for two consecutive voyages—Deviation in first voyage—Effect on charterer's liability to fulfil the contract.

A ship chartered for two consecutive voyages, in its first voyage made a deviation from the agreed course.

Held, that contract was an entire contract for two voyages and the deviation in the first voyage relieved the charterers from implementing the contract with regard to the second voyage if they elected to repudiate the contract.

(1939) 2 K. B. 117: (1939) 2 All. E. R. 240 reversed.

NEWSTEAD *v.* LONDON EXPRESS NEWSPAPER, LTD., (1940) 1 K. B. 377 (C.A.).

Defamation—Libel—Statement complained of true about existing person of same name as plaintiff—Absence of intention to defame—Effect.

The defendants, a newspaper published an account of a bigamy trial referring to the prisoner as "Harold Newstead, thirty-year-old Camberwell man". The account was true of a barman of that age and name. The plaintiff also was of the same name and age but in the hairdressing business. In an action for damages for libel,

Held, if there is a risk of coincidence it ought in reason to be borne not by the innocent party to whom the words are held to refer, but by the party who puts them into circulation.

BUTLER *v.* STANDARD TELEPHONES AND CABLES LTD., (1940) 1 K.B. 399.

Tort—Nuisance and trespass—Damage caused to plaintiff's building by action of the roots of trees on defendant's ground—Remedy of plaintiff.

Where by the action of the roots of poplar trees planted in the defendant's ground there was draining of the clay beneath plaintiff's house and subsidence of the plaintiff's building, the plaintiff has a right to cut the roots of the offending trees and is also entitled to recover damages, if damages has accrued to him or been suffered by him owing to the action of the roots.

RUSHBROOK *v.* RUSHBROOK, (1940) P. 24.

Divorce—Desertion—Deserting spouse certified lunatic—Effect on animus deserendi*—Presumption.*

Where a person is proved to be a lunatic accepted in law by certification as a lunatic it is impossible to make any inference at all that the lunatic is capable of having the *animus deserendi* and a petition for divorce based on mere factum of desertion during such period cannot succeed.

REEVES *v.* REEVES, (1940) P. 28.

Divorce—Period of six months between decree nisi *and decree absolute—Adultery of petitioner in such period—Effect.*

The six months interval between the decree *nisi* and the decree absolute is not in any way intended as a test of morality for the petitioner and it is not right to impose a test of that kind. The object is to enable the King's Proctor to make inquiries as to the *bona fides* of the petitioner's case. So adultery committed by the petitioner subsequent to the decree *nisi* cannot by itself stand in the way of the decree being made absolute.

JOTTINGS AND CUTTINGS.

Dramatic Strokes in Advocacy.—Whether occurring on the stage or in real life, sensational effects invariably appeal to the generality of people, and in a great trial nothing excites the interest of the spectator or reader so much as some dramatic coup by a master in the art of advocacy. In some cases the coup, like many another "impromptu," may have been carefully prepared beforehand, but in others it arises unexpectedly and spontaneously out of the turn which the trial may have taken; but whether rehearsed or not the effect on the spectator is the same, for to him it comes with the shock of surprise, and on that account excites his admiration of the tactical skill of its author. An excellent illustration of such a dramatic episode occurred, it will be remembered, in the Parnell Commission, when Sir Charles Russell fully exposed the forgeries of Pigott by asking that wretched man when

in the witness box to write down various words on a slip of paper, these on examination being found to be misspelt in precisely the same way as in the letters the subject of inquiry. No one will readily forget the effect of this dramatic stroke, and the collapse which followed. Striking though it was it was not without precedent for exactly the same method of exposing a forgery had been followed in a Scots court. There the forger when trapped by his faulty orthography, confessed his guilt, and this, too, after half a dozen engravers had given it as their opinion that the document in question was genuine. So much for expert evidence!—*L. T., 1940, p. 26.*

O'Connell and the Hat Trick.—The expression "the hat trick" so familiar with us in connection with our national game, had a very different meaning in the hands of Daniel O'Connell who, it will be recalled, was a master of the art of advocacy, and indeed second to none. Many anecdotes testify to his amazing skill in this sphere, and two of them may be recalled. In a murder trial at Cork the principal witness for the prosecution gave most damaging evidence against the accused, being especially emphatic about a hat found near the place of the murder, which, he swore, belonged to the prisoner whose first name was James and for whom O'Connell appeared. The hat being in court, O'Connell picked it up and said to the witness, "Are you sure that this is the same hat?" "Yes", was the reply. "Did you examine it carefully before you swore in your information that it was the prisoner's?" "I did." "Now, let me see," continued O'Connell, who began to examine the inside of the hat carefully, and then, still keeping his eyes on the interior of the hat he spelt very slowly the letters "J.A.M.E.S." He then inquired of the witness whether the hat contained that name. "It did," promptly replied the witness. "Then", said O'Connell handing up the hat to the bench, "there's an end of the case my Lord, there is no name inside the hat!" An acquittal followed as a matter of course. The second anecdote admirably illustrates his power of penetration and deduction. A suit was instituted regarding the validity of a will. O'Connell was engaged on behalf of those who sought to have it set aside, and he put several questions to one of the witnesses to ascertain whether or not the testator was actually alive when the will was said to have been signed. To these the unvarying answer was that "there was life in Mr. So-and-So when the will was signed." Struck by the form of this reply O'Connell thus addressed the witness. "Now, by the solemn oath you have taken, and as you will one day answer for the truth, was there not a live fly in the

dead man's mouth when his hand was put to the will?" In the greatest alarm, the witness confessed that this was so, thus accounting for the peculiar form of the answer.—*L. T., 1940, p. 26.*

An Arithmetical Test.—Duncan M'Neill, afterwards ennobled with the title of Lord Colonsay, a distinguished judge of the Scots bench, also exhibited remarkable skill in the conduct of the cases in which he was briefed. In one of these he administered a well-merited reproof to a medical witness who had too hastily formed an opinion adverse to the sanity of his—M'Neill's—client. The latter, a poor recluse named Yoolow, deformed in body as well as undoubtedly somewhat eccentric in his habits, was alleged by certain of his relatives who apparently had an eye to his belongings, to be incapable of managing his affairs, and accordingly they took proceedings to have this judicially established. At the trial one of the medical witnesses detailed the tests which had been applied to ascertain the mental capacity of Yoolow, among these being an arithmetical one. It came out in evidence that Yoolow had a sum of £1,200 in the bank on which he received the yearly interest of £20. Being asked at what rate per cent. this was, he replied that he was unable to say, never having been taught arithmetic. When it came to M'Neill's turn to cross-examine the witness, he said, "You may take time to answer this question. If £1,200 is laid out at interest and yields £20 yearly, how much is it per cent. by the year?" "I am not able to calculate that without pen and ink, not being conversant with such matters," answered the witness. "If you had pen and ink" continued M'Neill, "could you calculate it? Here are pen and ink." Thus faced with the problem the witness answered reluctantly, "I cannot say I could calculate it with pen and ink." So much, said M'Neill in effect for "the test by which you would adjudge this man an idiot, a test which you, an educated man, cannot yourself satisfy." The jury were very naturally much impressed by this cross-examination of the medical gentleman, which taken in conjunction with other points adroitly made by the skilful advocate, contributed to a verdict favourable to poor Yoolow.—*L.T., 1940, p. 26.*

Canadian Appeals.—If, as a consequence of the majority decision last week of the Supreme Court of Canada that it is constitutionally competent for the Parliament of the Dominion, should it deem it expedient, to abolish altogether the right of appeal from the Canadian courts to the Judicial Committee of the Privy Council in both civil and criminal cases, it will involve a serious

diminution in the work of the Committee, whose headquarters in somewhat commonplace surroundings in Downing Street have never seemed worthy of the place which the Committee holds in the sphere of the administration of justice. To the Board, as it is sometimes called, there has come a steady flow of appeals, and Canada has been fortunate in finding the members of the Committee so eminently qualified to deal with the many difficult questions that have been submitted to it; but it has to be quite frankly recognised that the great Dominions, naturally desire to be in greater measure self-contained in legal as in other matters. Appeals from the High Court of Australia have been seriously restricted in recent years, the view being held there as in other Dominions that appeals to a court sitting in England and composed predominantly of English judges is a serious limitation upon Dominion autonomy. In 1926 the Imperial Conference placed it upon record "that it was no part of His Majesty's Government in Great Britain that questions affecting judicial appeals should be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected", although isolated action was deprecated We may expect, therefore, ere long a cessation of that flow of appeals from the great western Dominion whose tribunals will be regarded as self-contained and self-sufficient. —*S.J., 1940, p. 49.*

Stopping the Case.—One of the Court of Appeal's reported decisions last term ruled against the right of counsel in civil matters to invite the jury to stop a case, since none should interfere in this respect between the judge and the twelve men. The Court expressly abstained from dealing with the practice in criminal trials, though in these the judge is more often faced with the question of asking the jury whether they have heard enough. Once in Ireland, at Listowel, however, the position was reversed. Judge Shaw was trying a case of rape in which the prosecutrix gave her evidence with remarkable boldness and baldness. At last in disgust he said to the jury: "Ah! gentlemen, you daren't hang a dog upon evidence like this. Just put your heads together and see if you want to go any further before acquitting the prisoner." After a whispered consultation the foreman spoke up: "Your Honour, we're unanimously of opinion that the boy didn't do it, but should your Honour be wishful to hear any more evidence, we wouldn't be stopping you".—*S. J., 1940, p. 58.*

The Wrong Case.—At Marylebone Police Court recently a special constable, referring to his notebook, began his evidence:

"At 7-30 p.m. on the 8th December, your worship . . . ." "But the summons says it occurred on the 15th," interrupted the clerk. "No, sir, it was the 8th," said the constable. At last it was discovered that he had lost his way in his notebook and was looking at the wrong case. Such mistakes have sometimes been carried further in higher places. Once in Ireland when a case was called on two counsel rose. The senior of them impatiently waved the younger down, and he, being newly called, imagined that the other had been brought in at the last moment to lead him. The opening obviously puzzled the court, and the reading of the affidavits only introduced further confusion. At last the presiding judge intervened: "What case do you think you are arguing, Mr. Bartley?" "I'm arguing *M'Carron* v. *Quaid*, of course," was the reply. "Ah! that explains it," said the judge. "The case that was called on was *O'Carroll* v. *Lane*." Bartley turned to the young man he had interrupted, saying indignantly: "Why don't you get up and argue your own case?"—*S.J., 1940, p. 58.*

Blaming the Law.—Sometimes transgressors of the law make the law itself their excuse. Thus, two respectable middle-aged East End mothers who were recently charged before Mr. Metcalfe with stealing twenty-two pairs of mittens from a shop pleaded that on the fatal day they had met in that very court to listen to a case involving some friends of theirs, that afterwards they had gone away and had some drinks and then more drinks and that they were still dazed by the effect of these refreshments when they did the deed. A little while ago Sir Robert Dummett had a delightful case before him at Bow Street. A man had been seen leaning against a horse outside the Law Courts. When the animal had shifted its position he had crashed to the ground and now he was charged with being drunk. When asked why he had been leaning against the horse he replied, unsmiling, in a small precise voice: "I was very worried, your worship. I had to appear in a case at the Law Courts and it worried me. I think the exitement of the Law Courts and the cold outside were responsible". When pressed he admitted that he had had a pint of ale but the magistrate genially discharged him under the Probation of Offenders Act, warning him not to get so worried in the future.—*S.J., 1940, p. 75.*

BOOK REVIEWS.

A TEXT-BOOK OF MEDICAL JURISPRUDENCE AND TOXICOLOGY, by Rai Bahadur Jaising P. Modi, L.R.C.P. & S. (Edin.), L.R.F.P.S. (Glasgow), Sixth Edition, Revised and Enlarged. Published by Messrs. Butterworth & Co. (India), Ltd., Bombay.

A text-book on Medical Jurisprudence and Toxicology which has passed through six editions in a comparatively short period does not require an introduction to the medical man or the lawyer. Dr. Modi has filled several important posts in many universities and has practical experience of teaching the subject to students of medicine and knows their requirements and difficulties. A text-book from his pen is bound to be of value to the students and practitioners alike. In the present edition of the book, he has introduced the necessary alterations and additions and new cases have been added with a view to illustrating important and interesting medico legal points. It is needless to say that the essentials of the offences have been clearly set out and explained and the application of the principles and knowledge of medicine in finding them out fully stated. A number of plates and illustrations have been given to explain and illustrate the statements of the author. We have every hope that with the added matter, this edition will receive an increasing measure of popularity than even the earlier ones.

THE MADRAS HINDU RELIGIOUS ENDOWMENTS ACT, 1926, by Y. V. Ramanarao Patnaik, M.A., B.L., Seniormost Superintendent, Office of the Board of Commissioners for Hindu Religious Endowments, Madras (Volume I). Published by Messrs. Janakiram & Co., No. 12, Buchi Babu Naidu Street, Triplicane, Madras. Price Wrapper Rs. 5 net, Full Calico Rs. 5-8 net

Ever since the Madras Hindu Religious Endowments Act was first passed, the legislature has been adding to and altering its provisions to a very large extent, that a publication giving the Act as amended up-to-date is almost a necessity for all those having to deal with the subject. The Local Government has also been making rules on an extensive scale and a collection of them is indispensable for the working of the enactment. This book which is edited by the Senior Superintendent of the Office of the Madras Hindu Religious Endowments Board and gives the text of the Act as amended up-to-date and the rules framed under it by the Government as also the bye-laws, the forms and all other useful information, will be found of great value. The book also gives the texts of the Malabar Temple Entry Act, 1938, the Madras Temple Entry Authorisation and Indemnity Act, 1939 and the Tirumalai-Tirupati Devasthanams Act of 1932. One might say that the book is almost an authorised edition of the enactments and will be found invaluable to all those having to deal with the subjects concerned.

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DOCTRINE OF PRIORITY OF CROWN DEBTS.

Doctrine, one of great antiquity

The doctrine of priority of Crown debts has been recognised from ancient times and is to be found in almost every system of law. The Hindu Dharma Shastras refer to it in more than one place. Yagnavalkya has stated[1]:

गृहीतानुक्रमाद्दाप्यो धनिनामधमर्णिकः ।
दत्त्वा तु ब्राह्मणायैव नृपतेस्तदनन्तरम् ॥

"A debtor shall be forced to pay his creditors in the order in which the debts were contracted, after first discharging those of a Brahmin or the King."

According to Katyayana[2]:

"If there be many debts at once, that which was first contracted shall be first paid, after those of a King or of a priest learned in the Vedas."

Land revenue had always been regarded as a paramount charge upon the land and if the subject did not pay it, the King may even grant the land to another[3].

The doctrine in English common law

The rule of English common law was contained in the maxim —*Quando jus domini regis et subditi concurrunt jus regis proeferri debet*: where the King's and the subject's title concur the King's title must be preferred[4]. By the common law the King had a prerogative of preference in payment to all his subjects and to be first satisfied[5]. The prerogative could be enforced in two different ways and by two different methods. The Crown may assert its

1. II, 41
2. Cit., in Vyavahara Mayukha, Ch. v, s. iv, pl. ix.
3. Cole. Dig, Book ii, ch. ii, pl. xiii.
4. Broom's Legal Maxims, 10th edn., p. 35; Quick's case, 9 Coke's Reports, 129-b; *R* v. *Wells*, 16 East 278 at 282.
5. *Parker, C. B.*, in *Rex* v. *Curtis*, Parker R. 95, 100: 145 E. R. 724.

right by seizing under a writ of extent, if need be, all the assets of the debtor where there has been no *cessio bonorum* and satisfy out of these assets the debts due, or the Crown may come into a proceeding in bankruptcy or to the winding up of an insolvent company or such like, prove its debt claimed and insist upon payment of this debt in priority to the claims of other creditors[1]. Formerly the theory of the priority of Crown debts was based on the personal pre-eminence of the sovereign. The King was the King and obviously took precedence over the subject. In modern law, however, the rights of the Crown are equated with the rights of the mass of the King's subjects and hence the doctrine has been propounded that it is right and just that the claims of the community as a whole should prevail over that of individuals.[2] The doctrine is one of universal application except where the legislature has thought fit to interfere.[3] There are two distinct prerogatives of which the Crown may avail itself regarding this matter, namely, (1) that it is not bound by a statute in which it is not expressly named, and (2) that it has a right to be paid in priority to all other creditors of equal degree.[4] The former prerogative as explained by Lord Coke in the *Magdalene College case*[5], was defined as follows by the Master of the Rolls in Ex parte *Post Master-General*[6]:

> "Where an Act of Parliament is made for the public good, the advancement of religion and justice and to prevent injury and wrong, the King shall be bound by such Act though not particularly named therein; but where a statute is general and any prerogative, right, title or interest is thereby devested or taken from the King, in such case the King shall not be bound unless the statute is made by express terms to extend to him."

In England after the Bankruptcy Act of 1883 and the Companies (Consolidation) Act of 1908 it has been held that both in bankruptcy as well as in winding up proceedings the Crown's prerogative rights stand controlled by the provisions of these statutes and as such Crown debts have no priority other than that given by the statutes in regard to payment[7], though in a case under the Colonial Bankruptcy Act, 1898 a different view was taken and the Crown was held

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1. *Food Controller* v. *Cork*, (1923) A.C. 647, 661.

2. In the matter of *Subramaniam Chetty & Co.*, (1922) I.L.R. 45 Mad. 156, 165.

3. Per *Lord Macnaghten* in *New South Wales Taxation Commissioners* v. *Palmer*, (1907) A.C. 179.

4. *Re Henley & Co.*, (1878) 9 Ch. D. 469, 481, 482; see also *New South Wales Taxation Commissioners* v. *Palmer*, supra and *Food Controller* v. *Cork*, supra.

5. 11 Coke's Reports. 74-b.

6. L. R. 10 Ch. D. 595, 601.

7. *Food Controller* v. *Cork*, supra.

entitled to preferential payment over all other creditors of equal degree unaffected by that statute.[1]

Ever since the Indian Councils Act, 1861 the Legislature in India has been competent to make laws which may trench upon the prerogative of the Crown. This is clear from S. 24 of that Act which provided that

"no law or regulation made by the Governor-General in Council shall be deemed invalid by reason only that it affects the prerogatives of the Crown".

In so far as there is no specific statutory abridgment the principles of the English common law relating to Crown debts will be applicable in India also. Excepting for a doubt expressed in *Ramachandra* v. *Pichaikanni*[2], the authorities are uniform in favour of such applicability[3].

The Crown's right to precedence stands mentioned variously. In some statutes the Crown is expressly given a first charge over properties in respect of payments due to it from any person and methods of working out the right are also specified. In the statutes relating to insolvency there are provisions postulating the priority of Crown debts.[4] What precisely constitute the liabilities regarding which the Crown enjoys a preference and whether the prescription of specific modes of realisation of Crown dues deprives the Crown of the prerogative remedies are matters which have been the subject of numerous decisions.

Meaning of Crown debts

It was the view of Chief Baron Comyn that,

"every person who by any means is chargeable to the King, shall be debtor to the King; for it shall be taken extensive; as where he is answerable to the King for debt, damage, duty, rent, arrears etc"[5].

Wherever the destination of the debt when realised was the state treasury the debt was to be regarded as a Crown debt[6]. The expression "Crown debt" has been characterised[7] as an unfortunate expression as likely to suggest that

1. *New South Wales Taxation Commissioners* v. *Palmer*, (1907) A.C. 179.
2. (1884) I.L.R 7 Mad. 434.
3. See *Manikkam Chettiar* v. *Income-Tax Officer*, I.L.R. 1938 Mad. 744: (1938) 1 M.L J 351, (F B.).
4. Ss. 49 and 45, Presidency Towns Insolvency Act; Ss. 61 and 44, Provincial Insolvency Act. *See also* Ss. 229 and 230 of the Indian Companies Act.
5. Digest, Title Debt G-1. *See* Godbolt, 293.
6. *Ex parte*, Usher, 1 Ball & Beatty 199; *Keily* v. *Murphy*, S. & Sc. 479; *Re* Dalton, 2 Molloy 442; *Judah* v. *Secretary of State*, (1886) I.L.R. 12 Cal. 445
7. *per* Lord Shaw in *Food Controller* v. *Cork*. (1923) A.C. 647, 665.

"under the name of prerogative, something is being claimed higher than that justice which is distributed among the subjects of the Crown, and this even under ordinary contracts, the construction of which among such subjects would not permit of the operation of preference".

Where a debt arises purely in *commercio* and does not spring out of a power vested in the Crown by way of the imposition of a duty or a tax the debt ought not with propriety be regarded as a Crown debt[1]. *Apropos* this question Lort Williams, J., has observed in *In re Northern Bengal Company Limited*[2]:

"The priority exercised regarding Crown debts by reason of the royal prerogative originally applied in practice only to debts arising out of questions of revenue and taxation, because those were the only debts which in former times were likely to arise in favour of the Crown as against the subject. In later days the Crown has become engaged to an increasing degree, both in England and in India, in trading and other activities in addition to those arising out of revenue and taxation, and consequently the modern tendency has been to restrict such prerogative rights by means of legislation to those matters such as revenue and taxation to which such prerogative rights originally applied".

Whether for a debt to constitute a Crown debt, in addition to its falling into the coffers of the state on recovery, it is further necessary that it should result only from an act done "for purposes of revenue" came up for consideration before the Madras High Court in *In the matter of Subramaniam Chetty & Co.*[3] The question there was whether in a case where the Government engages in undertakings in fields of industry, not to bring accretions to revenue, but to serve by way of industrial instruction to the people of the country, a debt payable to Government would be a Crown debt. Coutts Trotter, J., pointed out that while debts accruing through a sale of opium or trading in the Salt and Abkari departments would directly be Crown debts, such trade being "for purposes of revenue" within the meaning of 3 & 4 William IV, c. 85, the debts becoming due in industries started for demonstration purposes are also to be deemed Crown debts inasmuch as they result from carrying on *authorised trades* which can be regarded as acts done "for purposes of the Government of India" within the meaning of S. 20 (1) of the Government of India Act, 1919. In that view, the learned Judge held that the Government was entitled to precedence under S. 49 of the Presidency Towns Insolvency Act in respect of sums due to it for supply of soaps to the insolvent by the Kerala Soap Institute, Calicut, an institution run by Government for demonstration purposes.

1. *Food Controller* v. *Cork*, (1923) A. C. 647 at 667.
2. I.L.R. (1937) 1 Cal. 684: 41 C.W.N 458.
3. (1922) I.L.R. 45 Mad. 156.

Court-fee recoverable by the Crown under decrees in suits filed *in forma pauperis*[1], arrears of abkari revenue[2], arrears of income-tax[3], arrears of tax payable under the Madras Motor Vehicles Taxation Act[4], amount due in respect of kudimaramath under the Madras Compulsory Labour Act[5], amount due on sale of opium by Government[6], amount due for work done[7], have all been regarded as Crown debts. A debt does not cease to be a Crown debt merely because the person ultimately intended to be benefited was a private person[8]. Thus a fine imposed on conviction for criminal breach of trust though directed to be paid on recovery as compensation to the injured party will be deemed to be a Crown debt for purposes of preferential payment[9]. Where however there was a recognisance by a guardian in the matter of a minor it was held that the liability arising thereunder, though nominally in favour of the state was not a Crown debt.[10]

Remedies available to the Crown

The fact that certain Acts of the legislature specifically set out the priority of Crown debts in circumstances arising under those Acts cannot derogate from the general right of priority which the Crown has and the enactments should be ordinarily understood as merely making clear the particular application of the rule[11]. The remedies open to the Crown will remain unaffected despite the

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1. *Ganpat Putaya* v *The Collector of Kanara*, (1876) I.L.R. 1 Bom. 7; *Ram Das* v. *Secretary of State*, (1896) I.L.R. 18 All. 419; *Puthia Valappil Barga* v. *Veloth Assenar*, (1902) 12 M L.J. 471 : I.L.R. 25 Mad. 733; *Gayanoda Bala Dassee* v. *Butto Kristo Bairagge*, (1906) I. L. R. 33 Cal. 1040; *Ragho Prasad* v. *Mewa Lal*, (1912) 22 M L.J. 457 : I L.R. 34 All. 223 (P C.); *Babui Girija Kuer* v. *Secretary of State*, (1919) 50 I.C. 315; *Collector of Akyab* v. *Paw Tun U*, (1927) I.L R. 5 Rang 806; *Varadachari* v. *Secretary of State*, (1935) 70 M L.J. 601 : I.L.R. 59 Mad. 872

2. *Ramachandra* v. *Pichaikanni*, (1884) I.L.R. 7 Mad. 484; *Ibrahim Khan* v. *Rangaswami Naicken*, (1905) I.L.R. 28 Mad. 420.

3. *Kadir Mohideen Marakkayar* v. *Muthukrishna Aiyar*, (1902) 12 M. L. J. 368 : I.L.R. 26 Mad. 230; *Soniram Rameshur* v *Mary Pinto*, (1932) I. L. R. 11 Rang. 467; *Secretary of State* v. *Maw Nyein Me*, 1937 Rang L. R. 344; *Manikkam Chettiyar* v. *Income Tax Officer*, (1938) 1 M.L.J. 351 : I.L.R. 1938 Mad. 744 (F.B.)

4. *Deputy Commissioner of Police* v. *Vedantam*, (1935) 69 M. L. J. 832 : I. L. R. 59 Mad. 428.

5. *Sambasivan Chettiyar* v. *Secretary of State*, (1940) 1 M.L.J. 429.

6. *Judah* v. *Secretary of State*, (1886) I L R. 12 Cal. 445.

7. *Secretary of State* v. *Bombay Landing and Shipping Co.*, (1868) 5 Bom.H.C. 23.

8. In re *Smith*, (1876) 2 Exch. D. 47.

9. *Pichu Vadhiar* v. *Secretary of State*, (1917) I.L.R. 40 Mad. 767.

10. *Ex parte Usher*, 1 Ball & Beatty 199.

11. *Secretary of State* v. *Ma Nyein Me*, 1937 Rang.L R. 344.

indication of particular methods of realisation by the statutes concerned. S. 411 of the Civil Procedure Code, 1877 (corresponding to O. 33, r. 10) had provided that Court-fees shall be a first charge on the subject matter of the suit and shall also be recoverable by the Government from any party ordered by the decree to pay the same in the same manner as the costs of a suit recoverable under the Code. It was held that though the section indicated the manner in which the Crown may proceed to realise the amount due to it, still it will not preclude the Crown or its representatives from urging its prerogative and insisting on its rights of precedence over all other creditors, as for example, by applying to Court for payment from funds in Court belonging to the defaulter[1]. In *Soniram Rameshur* v. *Mary Pinto*[2], a receiver appointed in a mortgage action had collected the rents accrued *pendente lite* and deposited them in Court. The Commissioner of Income-Tax applied to the Court for payment out of that fund of arrears of income-tax due from the person entitled to the fund in preference to others, without any formal prior attachment. It was held that the application was competent. Similarly where money was due to the Crown by way of arrears of vehicle tax, it was held that it was open to the Deputy Commissioner of Police to apply to the Court for payment of the same out of the sale proceeds in Court realised by sale of the vehicle in execution by another creditor.[3] The fact that sections 8 and 9 of the Madras Motor Vehicles Taxation Act provided methods for recovering arrears of vehicle tax was held not to affect the remedies open to the Crown otherwise by way of prerogative. The question has now been considered by a Full Bench of the Madras High Court in *Manikkam Chettiyar* v. *Income-tax Officer*[4]. In that case the petitioner had obtained a money decree against one *G* and in execution attached and brought to sale some movable properties of *G*. Income-tax due by *G* to Government being in arrear, the Income-tax Officer applied to the executing Court under S. 151, Civil Procedure Code, for an order directing the payment out to him from the sale proceeds of the amount due from *G* as arrear of income-tax. Objection was taken that the application would not lie inasmuch as S. 46 of the Income Tax Act, 1922 had prescribed the modes of recovery of the tax It was held that the section was no bar to the maintain-

1. *Gayanoda Bala Dassee* v. *Butto Kristo Bairagee*. (1906) I.L.R. 33 Cal. 1040: see also *Ram Das* v. *Secretary of State*, (1896) 18 All. 419; *Babui Girija Kuer* v. *Secretary of State*, (1919) 50 I.C, 315 and *Varadachari* v. *Secretary of State*, (1935) 70 M.L.J. 601: I.L.R. 59 Mad. 872.

2. (1933) I.L.R. 11 Rang. 467.

3. *Deputy Commissioner of Police* v. *Vedantam*, (1935) 69 M.L.J. 832: I.L.R. 59 Mad. 428.

4. (1938) 1 M.L.J. 351: I.L.R. 1938 Mad 744 (F.B.).

ability of the application by the Income-tax Officer under S. 151, Civil Procedure Code, and that both justice and convenience justified such conclusion. The same view was taken in *Sambasiva Chettiar* v. *Secretary of State for India in Council*[1]. In that case a receiver had been appointed pending a suit on a simple mortgage. A certain amount being due to the Government from the mortgagor in respect of kudimaramath the Collector preferred a claim to the Court for directions to the receiver under O. 40, r. 1 to pay the money due to the Crown out of the amount realised by the receiver and deposited in Court. It was held that such a direction could be given.

The Crown's prerogative of preference operates only where the debts are equal in degree. In other words even a Crown debt cannot take precedence over an earlier mortgage or lien created by the defaulter.

> "A mortgagee is liable to have his security postponed to certain claims of the Crown, which by virtue of its prerogative, has the right to issue an extent or execution against all the lands of its debtors except copyholds and to follow such lands into the hands of *subsequent* mortgagees or purchasers though without notice"[2].

It is only when claims of the Crown and claims of common persons concur or come into competition that the Crown is preferred. A prior mortgagee or lienholder will not be prejudiced[3].

SUMMARY OF ENGLISH CASES.

In re A DEBTOR (No. 13 OF 1939), (1940) 1 Ch. 157.

Bankruptcy—Notice served on debtor before war—Failure to comply with—If debtor entitled to have stay under Courts (Emergency Powers) Act 1939, on ground of inability to pay his debts owing to the war—Onus.

The bankruptcy notice was served on the debtor in May, 1939, and the debtor failed to comply with it; accordingly she was at that date unable to pay her debts and that inability was not and could not be suggested to be in any way the result, directly or indirectly of the war. The fact that the debtor has since found difficulty in realizing the property the sale of which might have enabled her to satisfy the judgment-creditor at a later date is an irrelevant

1. (1940) 1 M.L.J. 429.
2. Coote's Mortgages, 9th edn., p. 1366.
3. *Chinnasami Mudali* v. *Tirumalai Pillai*, (1901) I.L.R. 25 Mad. 572; *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar*, (1902) I.L.R. 26 Mad. 230; *Ibrahim Khan Sahib* v. *Rangasami Naicken*, (1905) I.L R. 28 Mad. 420; *Dost Muhammad Khan* v. *Mani Ram*, (1902) I.L.R. 29 All. 537 (F.B.); *Ragho Prasad* v. *Mewa Lal*, (1912) 22 M.L.J. 457: I.L.R. 34 All. 223 (P.C.); *Bank of Upper India* v. *Administrator-General of Bengal*, (1917) I.L.R. 45 Cal. 653.

consideration and the stay of proceedings cannot be granted. The onus is on the debtor to prove that inability to pay debts is due to the war, directly or indirectly.

CARPENTERS ESTATES, LTD. v. DAVIES, (1940) 1 Ch. 160.

Specific performance—Contract by vendor of building sites to construct roads and sewers on land in his possession—Specific performance—When can be granted.

Defendant who sold some building land to the plaintiffs covenanted to make roads and sewers. Defendant did not carry out the covenant with regard to sewers and the plaintiffs though they had not commenced building operations claimed specific performance.

Held, the plaintiffs were entitled to a decree for specific performance as they had a substantial interest in the performance of the contract and could not have been properly compensated for breach of the covenant by award of damages. The nature of the work which the defendant had undertaken to do is sufficiently clearly defined. The mere fact that the defendant has not got possession by the contract of land on which the work is contracted to be done is not necessarily a complete bar to granting specific performance. It is sufficient if it is established that the defendant is in possession of the land on which the work is contracted to be done. *Wolverhampton Corpn.* v. *Emmons*, (1901) 1 K.B. 515, observation of *Romer, L.J.*, held not strictly accurate.

WILSON v. LONDON MIDLAND AND SCOTTISH RAILWAY, (1940) 1 Ch. 169.

Companies Clauses (Consolidation) Act, 1845, S. 85—Directors—Directors also directors or shareholders of other companies trading with the defendant company—If precluded from acting as directors of the defendant company.

The plaintiff a stockholder in the company claimed a declaration that directors of the defendant company who are directors and trustees of other incorporated joint stock companies trading directly and indirectly with the defendant company are precluded from acting as directors of the defendant company and their office has become vacant. The directors were not made defendants to the action.

Held, (1) the declaration cannot be made in the absence of the directors and without giving them an opportunity of being heard in their own defence.

(2) What the Act contemplates in S. 85 is that it is only persons who are concerned in contracts with the defendant com-

pany in the sense of having a commercial interest in contracts with the defendant company who are aimed at by this section, and that, if and so far as the commercial interest consists only in a shareholding in a company which enters into a contract with the defendant company such shareholder may nevertheless continue to be a director of the defendant company. It is immaterial, in addition to being a shareholder, he is also a director of the contracting company. It is only his commercial interest that is aimed at.

Decision in *Lapish* v. *Braithwaite*, (1926) A.C. 275 under similar provisions of Municipal Corporations Act applied.

HODGES (G. T.) & SONS *v.* HACKBRIDGE PARK HOTEL, LTD., (1940) 1 K.B. 404.

Principal and agent—Compulsory sale of property to Government—Agent previously employed to find a purchaser if entitled to commission.

The plaintiffs, a firm of house agents had been asked in 1933 by the defendants to find a purchaser of their premises. The attempt to sell came to nothing. The defendant was not willing to sell at less than £12,000 to a Colonel (introduced by plaintiffs' another agent) who was really investigating directly or indirectly on behalf of the war office. Later, the war office requisitioned the whole estate under statutory powers and the arbitrators fixed the price for such purchase between £7,000 and £8,000. In a claim by plaintiff's firm for commission,

Held, (reversing the decision of *Lewis, J.*)

Per *Scott, L.J.*—In the absence of a voluntary sale, there was no contractual relationship between what the plaintiffs did and the transfer of the estate under compulsory purchase and the plaintiffs were not entitled to any commission.

Per *Goddard, L. J.*—"You employ an agent to effect a transaction which is of service to you, and in the circumstances which ended in the defendants being expropriated from their premises and land and having to accept a price, at which they were not willing to sell, it is impossible to say that the plaintiffs have earned any commission out of any employment which was conferred upon them by the defendants." *Toulmin* v. *Miller*, 12 A.C. 746, applied.

SMITH *v.* MOSS AND ANOTHER, (1940) 1 All. E.R. 469 (K.B. D.): (1940) 1 K.B. 424 (K.B.).

Tort—Negligence—Immunity of husband from liability for tort to wife—Extent—Negligence of husband in driving car as agent of owner—Claim by wife for damages against such owner—Sustainability.

The defendant *R* was the registered owner of a motor car. There was no driver for the car and whenever she wanted to use the car, her son, and he alone was allowed to drive it. One day the car was being used to convey *R*, her son and his wife from a party. The son was driving. The mother was taken to her house and while taking the car back to the garage in the son's house there was a collision with another car due to the son's negligence. The wife sustained injuries and claimed damages against her mother-in-law. It was contended that the wife cannot recover damages against her mother-in-law, because the accident was caused by the negligence of her husband and a husband can commit no tort against his wife.

Held, the mere fact that the husband is acting as an agent for some one else, and, while acting as such agent, happens to commit a tort, such as negligence in the driving of a motor car in which his wife is a passenger does not deprive his wife of her right to recover against his employer.

SMITH (R. M.) *v.* SMITH (A.E.), (1940) P. 49.

Divorce—Desertion—Husband and wife living separate in parts of same house (without physical separation between the parts) —Refusal by husband of suggestion for reconciliation—If constitutes desertion.

Where the only element of living together is that husband and wife were actually existing in one house though there was no physical separation between the parts of the house in which they were living, the case is one of desertion and is not one in which the wife is precluded from asserting desertion by the mere fact that they were residing in the same house. The refusal by husband to have reconciliation and persisting in withholding cohabitation with his wife affords a starting point for desertion and a decree *nisi* ought to be granted.

NASH OTHERWISE LISTER *v.* NASH, (1940) P. 60.

Petition for decree of nullity on the ground of husband's impotence—Defence of lack of sincerity—Limits.

In a petition by a wife for declaration of nullity on the ground of the impotency of her husband, the husband contended that the petitioner was guilty of want of sincerity in presenting the petition.

Held, that the "sincerity" with which the Court is concerned has reference only to the sincerity of the plea and has nothing whatever to do with either (*a*) the general character of the

petitioner as a sincere or insincere person or (*b*) the conduct of the petitioner before her marriage or the motives which prompted her to enter into the marriage. Previous knowledge of impotency is only evidence and not an acid test of insincerity. The Court is concerned only with the question whether since her marriage the petitioner has been guilty of any conduct which ought to estop her from having the remedy she seeks.

JOTTINGS AND CUTTINGS.

BLACKMAIL*

A sketch by the Hon'ble Mr. Justice Wadsworth broadcast from the Madras Station of the All India Radio, on the 11th April, 1940.

SCENE I

Subramaniam : Good morning, Mr Shanmugam. I don't think I have had the pleasure of meeting you before, have I?

Shanmugam : No, Mr. Subramaniam, I don't think you have met me, but you used to know my uncle well in years gone by. He was Puniakoti Mudaliar, the contractor at Kachipur.

Subramaniam : O! You are the nephew of old Puniakoti, are you? Splendid old chap he was and one of the best contractors I ever knew. I hope he is still thriving?

Shanmugam : No I regret to say that he died last year.

Subramaniam : Dear me! I am very sorry to hear it

Shanmugam : I am sure you are. And I have no doubt you will be more sorry still when I tell you that on his death all his account books came into my hands

Subramaniam : His account books? What have I got to do with his account books? I don't understand what you mean, Mr. Shanmugam

Shanmugam : O! You don't understand! Well I had better explain myself. Perhaps you know that Puniakoti was my guardian and that the money with which he financed the contract business was my money

Subramaniam : I didn't know it. But I still don't see what that has got to do with me.

Shanmugam : No? I think I am right in saying that in 1925 you were Assistant Engineer at Kachipur and my uncle was working as a contractor under you Isn't that so?

Subramaniam : Quite correct The best contractor I ever had. A splendid fellow.

*Published by courtesy of the All India Radio.

Shanmugam : Your enthusiasm is perhaps not entirely gratuitous, Mr Subramaniam! I find from my uncle's accounts that on 8th July, 1925, he paid you a sum of five thousand rupees at a time when he was executing extensive contracts under your control. What have you got to say about that?

Subramaniam : I..........I don't see what it has got to do with you even if he did

Shanmugam : O! Don't you? Well, I'll tell you. That money was my money and it was paid to you as a bribe and I intend to get it back again

Subramaniam : You are an optimist! If you think that you can claim back money paid by your uncle fifteen years ago, merely by making scurrilous charges against one of your dead uncle's best friends, you're making a grave mistake.

Shanmugam : We'll see about that. Somehow I can't quite imagine how you will defend a suit for the recovery of a big bribe without rather blotting your official copy-book and spoiling your chance of becoming a Superintending Engineer next year

Subramaniam : O—so it's blackmail you are after, is it? You had better be careful or you'll find yourself doing two years in the Penitentiary.

Shanmugam : Come now, Subramaniam. It's no use bluffing. You know as well as I do that no one can be sent to jail for threatening to file a civil suit for a just claim And you know perfectly well why that money was paid to you and who it belonged to Moreover, even if you had got a defence, which you haven't, you wouldn't dare to let the case go to Court and ruin your prospects in the service. So you might as well face the facts and pay back the money which you never ought to have taken.

Subramaniam : The money never went into my pocket and I don't see why I should pay it—especially after all these years.

Shanmugam : You needn't think you can plead limitation. It is trust money and my lawyer tells me that I shall have no legal difficulty in making out my claim Anyhow I will give you one month in which to make up your mind whether you will pay up like a sensible man or face the music If you prefer to fight the matter, I have no objection, but I warn you that it will be your ruin, whichever way the suit goes. So I wish you good morning, Mr. Subramaniam. You can send your cheque to me care of the Co-operative Bank at Kachipur.

(*Steps receding. Pause*).

Subramaniam : You nasty little bit of work! I'll get even with you somehow (*Pause*) Ramayyar!

Ramayyar : (*In distance*) Hello! (*Steps approaching*) Who is that nasty-looking little chap you have been hobnobbing with?

Subramaniam : You may well call him a nasty little chap It is a young man called Shanmugam, from Kachipur, who has been trying to blackmail me for five thousand rupees

Ramayyar : Five thousand! Phew! You must have a pretty lurid past to be worth as much as that to a blackmailer. And I always thought you such a steady old bird!

Subramaniam : It's no joking matter, Ramayyar. This fellow has got a real pull over me and I don't know how to deal with him.

Ramayyar : But how on earth have you landed yourself in such a mess?

Subramaniam : It's rather an ancient story. When I was a young assistant at Kachipur in 1925, my boss was that corrupt old blighter Loganathan. He had worked out a system for milking the contractors which was really rather masterly. The contractor paid five per cent. of every contract to the local Assistant Engineer. The assistant paid the amount, less a small commission, to Loganathan's brother-in-law. Loganathan had nothing to do with it and if there was any trouble, it was the assistant who would stand the racket. If the assistant was foolish enough to object, every job of work he did was officially damned and his confidential reports were unfit for publication. I thought I would avoid trouble by sending the money on, and I salved my conscience by not deducting any commission. And this is the result! Loganathan's dead and gone, so it's no good blaming him. I threatened Shanmugam with prosecution, but he's cunning enough to see that you can't send a man to jail for threatening to file a civil suit.

Ramayyar : But what about limitation? Surely he can't get a decree for money paid in 1925?

Subramaniam : He says he was a minor and that the money was his money held in trust, so limitation will be no use to me. And anyhow, as he points out, how can I defend the suit without ruining my official reputation for ever? We must find some other way out.

Ramayyar : Well the only thing I can suggest is that you should call in Ganesha Iyer.

Subramaniam : Ganesha Iyer? You mean the funny little old lawyer man who is said to be such an expert at getting into the Court by the back door?

Ramayyar : That's the man. He's up to all the tricks of the trade, but he never lets a client down and he won't stir a hand to help you unless he thinks the cause a good one. Once he is con-

vinced that his client has a real grievance, he is a perfect marvel at finding a crooked way out of a tight corner. He's your man

Subramaniam : Well you know that I don't think much of lawyers as a class; but if your Mr. Ganesha Iyer can get me out of this mess, I'll endow a scholarship at the Law College.

SCENE II.

[*In the office of Mr. Ganesha Iyer.*]

Subramaniam : You see the position, Mr. Ganesha Iyer. I never touched an anna of this money, except to pass it on. Shanmugam probably knows that quite well, but he thinks he is safe from prosecution, and he thinks I can't defend the suit Now what do you suggest?

Ganesha Ayyar : Hm!................I don't think a prosecution for extortion would stand much chance, even if you were willing to prosecute, which, I take it, you aren't The suit is a different matter. He would have to prove his case—that the money was his and not his uncle's, that you knew the money was trust money, that you not only received the money, but kept it and that the money was not paid for a legitimate purpose. Rather hard to establish all these points and I can imagine that a searching cross-examination might land him in difficulties.

Subramaniam : But you don't seem to realise my difficulty, Mr Ganesha Iyer. It is no good telling me how I can defend this suit, when I daren't defend it. He is throwing mud and the mud will stick, even if he fails to prove his facts He knows well enough that there will be a vacancy as Superintending Engineer next year and what will be my chance of promotion with a bribery case hanging over my head? No. You must find some way of stopping the suit, or I shall be ruined. I was told that you are very expert at the ....er..........side lines of legal work.

Ganesha Ayyar : I hope, Mr. Subramaniam, that you don't think me an expert in unprofessional practices?

Subramaniam : O no! Mr Ganesa Iyer, I wouldn't suggest anything of the kind. Still, I had hopes that you might be able to devise some way of keeping this case out of the Courts

Ganesha Ayyar : Well we will see what can be done about it. But I hope you realise that it is at least as expensive to fight a case outside the Courts as it is to defend it in the ordinary way?

Subramaniam : You need have no fear that I shall grudge you the money This case means a lot to me and I don't mind paying anything in reason.

Ganesha Ayyar : That is the sensible way of looking at it and I will try and keep the cost as low as I can Now if this case went into Court I should charge you a fee of hundred and fifty rupees

for defending it and it would cost you as much again in incidental expenses—to say nothing of the probable cost of an appeal. I suggest that you should pay me five hundred rupees to cover all fees and expenses. Do you think that is too much?

Subramaniam : No, I will pay it gladly if only you can get me out of the mess.

Ganesha Ayyar : Well, I can't guarantee success, but I have an idea that I know how to deal with friend Shanmugam and it is better that you shouldn't know anything about it at present. There is one other matter; I would ask you to give me your word not to ask for any details of the costs—there are certain expenses which are necessary, but must be kept confidential

Subramaniam : I quite understand and am most grateful to you for your help.

Ganesha Ayyar : That's settled then. As you are going out, would you mind telling my clerk Natesan that I want to speak to him?

Subramaniam : Certainly Good morning.

Ganesha Ayyar : Good morning.

(*Steps retreating;*

Door bangs;

Steps advancing.)

Natesan : You sent for me, sir?

Ganesha Ayyar : Yes, I have got a job of work for you First I want to know what friends and relations you have got in the municipal office, the police station and the local revenue department.

Natesan : Well, there is my cousin, Gurusami, who is a sanitary inspector. And there is the head constable of the town police station who was my class-mate. I haven't any relation in the revenue department, but there is a clerk in the taluk office who owes me twenty-five rupees and might be willing to help for a consideration.

Ganesha Ayyar : Splendid Get into touch with them all at once. Here's twenty rupees for preliminary expenses and you might tell them that anything they do will be well paid for and no stories told Now do you know Shanmugam of Kachipur?

Natesan : Yes, I know him—and a nasty little fellow he is too.

Ganesha Ayyar : I dare say. But what I want you to do is to go round the bazaar and find out who he owes money to. Then get into touch with his creditors and see how many of them are willing to file small cause suits at the expense of someone whom you

had better describe as a political opponent You see, this Mr. Shanmugam has been making a nuisance of himself and I want to send him a shower of greetings—in the form of suit notices, prosecution summonses and any other forms of legal unpleasantness that you can think of Then when we have got him into a sufficiently chastened frame of mind, it will be your job to go and see him and convince him that nastiness doesn't pay. You see the idea? Moral uplift and prevention of anti-social activities. That's the great work!

Natesan : I get the idea, sir. Give me two days and I'll have his morals uplifted as they've never been uplifted before!

SCENE III.

[*In the bangalow of Mr. Shanmugam.*]

Shanmugam : Hell's bells! Here's another! That makes five suit notices, two prosecution summonses and two encroachment eviction notices, all served on me in the last 48 hours. (*Shuffles papers*) Listen to this one. Abdul Karim. . retail shop.... . amount of 20 rupees 3 annas 5 pies. .. the old devil knows perfectly well that he'll be paid if he's patient. I wonder what makes him so anxious to rush to Court and lose a good customer! Then what about this..................summons to appear before the Bench Court..............committing nuisance in a public place! And I expect every man in the Court does the same thing every day of his life! Why have they pitched on me? I've got no quarrel with the police. Then there's the municipality threatening to prosecute me unless I fill up the insanitary pit in my backyard! It's been there for the last fifty years and nobody ever called it insanitary before: and it'll cost me five hundred rupees to fill it up. Then there's the Tahsildar joining in .. . . .encroachment in survey number 216........penalty of ten rupees! What the blazes has started them all off? (*Noise of door. Steps approaching*).

Hello! Who are you?

Natesan : My name is Natesan. I'm a ......a law agent and I heard that you might want help with a case.

Shanmugam : A case! A dozen cases, you mean And if they keep coming in for another week as fast as they have done for the last two days, we'll need a special Court to try them What I want to know is who is at the bottom of it all and how I am to deal with him.

Natesan : Ah! Perhaps I can help you there. You see, I have great experience of legal matters and am in touch with all the chief litigants. I heard that you were threatening to file a suit against a P.W.D. gentleman called Subramaniam

Shanmugam : The devil you did! And who told you that, I wonder?

Natesan : I am afraid that I cannot answer that question. But I am in a position to assure you that if you will give me a receipt for the amount of your claim against Subramaniam and a written undertaking not to take any legal proceedings against him, all the notices you have received during the last two days will be withdrawn.

Shanmugam : What! all the suits and the prosecutions and the encroachment proceedings?

Natesan : Yes, all of them. And in order that there might be no beating about the bush, I have brought the receipt and the undertaking typed out for you to sign.

(*Shuffling of paper.*)

Shanmugam : You........You......infernal old scoundrel! Why that's blackmail!

THE RULE OF LAW AND LAW REFORM.

Speech delivered by Sir Alladi Krishnaswami Iyer, *Kt.*, Advocate-General of Madras while presiding over the Golden Jubilee Celebration of the Nellore Bar Association on 13th April, 1940.

"The profession is passing through a crisis on account of the severe economic depression which has its repercussions in every sphere of our national life During these difficult times it is possible that, here and there, there may be temptations to stray from the right path and relax the high standard of rectitude and integrity which are expected of every member of the Bar It is all the more necessary for us to make a determined effort to keep up the highest traditions of the Bar and to see that cases of professional delinquency, which I regret to say now and then come up before the courts, do not recur.

There is no reason to suppose that the influence for good of the profession will wane with the growth of democratic institutions. The lawyer will have to play a more important part in the future than even in the past The ringing words of Burke about the legal profession on the eve of the American Declaration of Independence are as true to-day as when they were uttered.

Much as I doubt whether a festive gathering like the one in which we are all assembled is a proper one for discussing any serious subject, I cannot resist the temptation of referring briefly

to one or two topics in which I happen to take some interest and in which I have no doubt most of you are interested The subject of the Rule of Law is of absorbing interest to any student of jurisprudence. There is, I feel, a certain appropriateness in choosing it as the theme of my address as, at this juncture, Great Britain is engaged in a mighty struggle against a power which is flouting all rules of International Law and is attempting to introduce into the relations between nations the law of the jungle. Whatever might be India's differences with Great Britain, there is no shade of opinion which does not recognize that Britain's cause is right and just and that she is fighting for the establishment of liberty and the Rule of Law Any student of British Institutions knows that the foundations of the British Commonwealth are laid on the Rule of Law.

It may be of interest to you to note that the concept of the Rule of Law forms the basis of even ancient Hindu jurisprudence, though the expression may not have had precisely the same significance. In the Vedic and Upanishadic texts, there is frequent reference to the monarch being under the sway of law. By upholding the law, says the Arthaśastra, the king becomes a realm-sustainer or Rāshtrabhṛth The Brihadaranyakopanishad emphasises the idea of the law being the king of kings Professor Jayaswal and Mr Ramachandra Dikshitar in their recent and very instructive treatises have thrown considerable light on the subject. Our ancients had a very high conception of justice in the scheme of administration.

While there was no rigid rule of selection to the village courts, the central judiciary was appointed by the monarch and great professional qualities were expected of a judge. According to Yājnavalkya, the qualities in a lawyer that marked him out to occupy judicial offices were independence of character, great learning in the various branches of law, and impartiality.

श्रुताध्ययनसंपन्ना धर्मज्ञाः सत्यवादिनः ।
राज्ञा सभासदः कार्या रिपौ मित्रे च ये समाः ॥

The Mrichchakatika describes the qualities of a Judge in these terms: "A Judge should be learned, sagacious, eloquent, dispassionate, impartial; he should pronounce judgment only after due deliberation and enquiry; he should be a guardian of the weak, a terror to the wicked; his heart should covet nothing, his mind intent on nothing but equity and truth." Equality before the law was the ideal of Hindu administration, though on account of the existence of caste as an institution, with due regard to the habits of the different castes, differential punishment was countenanced.

While it cannot be asserted that the separation of the executive from the judicial functions was insisted up on as a matter of pure constitutional theory, Professor Jayaswal remarks: "The adminis-

tration of justice under Hindu monarchy remained always separate from the executive and generally dependent in form and ever independent in spirit." It may be of interest to note that the legal profession is not entirely of British Indian origin There are passages in Sukranithisāra, which are extracted in a learned editorial in the Madras Law Journal, 1909, which point to the existence of the legal profession as an indispensable part of the machinery of administration of justice, though curiously enough legal assistance seems to have been denied in certain criminal cases as distinguished from civil cases.

From the point of view of English Constitutional Law and legal theory, students of Dicey are familiar with what the expression 'Rule of Law' normally connotes. Leaving aside its relation to the development of the British constitution, according to Professor Dicey, the Rule of Law in the first place means the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness, of prerogative or even of wide discretionary authority on the part of the Government Englishmen are ruled by the law and by the law alone; a man may be punished for a breach of the law but he can be punished for nothing else. It means again equality before the law or the equal subjection of all classes to the ordinary law courts and excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals, there being nothing really corresponding to the 'Administrative Law' or the 'Administrative Tribunals' of France. There have been criticisms by recent writers of Professor Dicey's exposition of the subject on the ground that the Professor had not clearly appreciated the system of the Administrative Law in France and in Germany and that, in some respects, subject aggrieved against the action of the executive authority has better redress under the administrative system obtaining in France than under the English system of administration of justice. And, in this connection, it has been forcibly pointed out that the English doctrine of the immunity of the Crown from action has the result of affording no effective or adequate remedy for an aggrieved subject in several cases.

The criticisms that have been offered against the views of Dicey may be formulated under different heads:

I. Professor Dicey overstresses the point in that he ignores that even in what are termed as Totalitarian States the acts of the executive are done under the authority conceded by the sovereign legislative power. Such a criticism, as is pointed out in his recent book, *The Constitution of England from Queen Victoria to George, VI*, 1940, by Professor Keith, misses the real point of Dicey's claim, namely, that the spirit of English law utterly repudiates the state

of affairs that prevails in Germany to-day, the executive being armed with authority over the lives and fortunes of citizens and in the result is not subject to any judicial control. The distinction lies not so much in an act being under colour of law under the one system and not so under the other system, as it is inconceivable that any act in a civilized state has not some kind of sanction under the law of the land but in the spirit that underlies the working of the institutions and in the machinery available for the review of the acts of the Executive. There is no reason to suppose that what is done in a country like England under the stress and strain of war may not, in some respects, resemble acts countenanced in a Totalitarian State. But it is one thing to suspend the writ of *habeas corpus* in an emergency and quite another thing to have an authoritarian administration as the normal condition.

II There is no special merit in the acts of officials being in the last resort reviewable by the ordinary civil courts in the land, as the Administrative Courts in France with a right of appeal to an ultimate Court of Appeal afford better redress to an aggrieved subject as against the state than in England In connection with the relative merits of the British and Continental systems, stress has also been laid by these critics on certain features in the constitutional development of the 19th century, namely, the recognition by Parliament that ordinary types of courts were not well adapted to deal with certain classes of questions. The increased sphere of functions of the modern state has rendered inevitable the creation of various administrative bodies and tribunals, some exercising judicial and quasi-judicial functions and the consequent restriction, if not the complete abrogation in certain instances, of the jurisdiction of the ordinary courts.

After a careful examination of the various points of view, the Committee on Ministers' Powers, appointed in England some years ago to examine the whole position, came to the conclusion that British opinion was not prepared to accept the argument that the French system for the obtaining of redress against official conduct affords better results and that the essential principle of English jurisprudence, *viz.*, the doctrine of equality before the law, is better secured by a citizen having recourse to a Judiciary which is entirely independent of the Executive The Committee on Minister's Powers, while recognizing the modern trends in administrative methods, suggested the remedy of recourse to the ordinary courts of the land at least by an appropriate reference where a purely justiciable issue was involved and recommended the observance of certain rules of procedure for hearing by administrative bodies, as also the simplification of the procedure in regard to Prerogative Writs in cases where there is an error or defect of jurisdiction on the part of these administrative bodies or tribunals. Professor Keith is inclined to take the view that the Committee in its recommenda-

tions has not offered any constructive suggestions to give the proceedings of these administrative bodies a more judicial character, thereby making them better instruments of justice than now

III. Dealing with the subject of the Rule of Law, the critics of the English system have laid stress on the English contitutional doctrine of the immunity of the Crown from civil proceedings and the denial to a subject of any effective remedy for wrongs suffered by him. It is also pointed out by these critics that the only remedy available to a subject, under the English law, *viz*, the right of recourse against the offending official, is hedged in either by various statutory restrictions or seriously curtailed by enactments giving a statutory protection or indemnity to the official concerned.

The rigour of the rule as to the immunity of the Crown from actions by the subject is to some extent modified by various recent enactments in the Dominions, by recoure, in certain instances to the machinery of incorporation and by special provisions in constitutional enactments like the Government of India Act recognizing a right of suit But even if we take into account the legislative provisions referred to above, the law relating to proceedings against the Crown or Crown Departments cannot by any means be said to be in a satisfactory state in England or the countries governed by British jurisprudence.

I shall say a few words regarding the connected subject of Delegated Legislation. The grant by the British Parliament of authority to legislate to the executive is not of recent origin. We have instances of such delegation even as early as the 17th and 18th centuries and Delegated Legislation became a common feature of the 19th century. The practice of delegating legislative powers received a special impetus during the last war and is of daily occurrence at the present day In the Colonies and the Dominions, it is of special interest to the constitutional lawyer and historian to note that the Judicial Committee gave an impetus to a large scale delegation by the leading decisions in *The Queen* v. *Burah* and *Hodge* v. *The Queen* by holding that the Colonial and Dominion legislatures have plenary authority to provide for the extension of an Act by an executive fiat or to clothe the executive with a rule-making power to carry out the puropses of the Act and that such an exercise of the sovereign power of the legislature is not open to the attack of *delegatus non potest delegare*. "How far it shall seek the aid of subordinate agencies and how long it shall continue them are matters for each legislature and not for the Courts of law to decide." The only effective check on Delegated Legislation is the judicial jurisdiction to test the *vires* of the rules enacted with reference to the scope and intendment of the main enactment. In recent times even this power of judicial review has been sought to be curtailed by various parliamentary devices such as a provision that

the publication in a Gazette shall be conclusive evidence that certain requirements of an Act have been complied with or that a rule shall not be liable to be questioned before a court or a provision that a rule shall have the same effect as an Act of Parliament In spite of the danger attending such a legislative procedure, *viz.*, the danger of passing Acts in too summary a manner and leaving undue freedom to the Executive to interfere, it cannot be gainsaid that there are also certain obvious advantages in such a procedure. The reasons for such a delegation are discussed very fully in Professor Carr's admirable analysis:

(*a*) The great demands made on the time of Parliament by modern social and international problems forbid the discussion in detail of any legislation and to attempt to do so may mean Parliament neglecting essential duties

(*b*) The limited inclination for technical knowledge of any miscellaneous body like the modern legislature; many measures may be so technical that they cannot be effectively discussed by members

(*c*) The happening of events which require immediate attention when the legislature is not in session or is otherwise incapable of giving immediate attention to the problem.

If the problem is examined from an unbiassed standpoint, it looks as if Governments in the present era cannot go on without delegation of wide legislative authority to the Executive Lord Donoughmore's Committee recognized this, as also English writers on the subject, like Professors Carr and Willis

To meet the objection as to large-scale delegation being inconsistent with parliamentary or legislative sovereignty, various safeguards and devices have been suggested, but they are all in the stage of experimentation The safeguards suggested are as follows:

(1) Placing the regulations before the legislature. [The effectiveness of this method of control was discussed at length by the Lord Donoughmore Committee and the conclusion which may be gathered from the evidence and the report is that this procedure is unsatisfactory.]

(2) A suggestion as to the creation of standing committees of the legislature to scrutinize legislation for the purpose of drawing the attention of the members to anything out of the ordinary course.

(3) The setting up of temporary committees of various sorts to consult with the Government in regard to the issue of any suggested regulations. It is very doubtful whether any of the steps suggested above will be an effective or appropriate check on Delegated Legislation. Such a necessity is not of course to overlook the attendant dangers of a widespread delegation.

The subject of Delegated Legislation has given rise to a very interesting discussion in recent years as to the full scope of the decision in *The Queen* v *Burah,* (1878) L.R 5 I.A 178 The theory has been put forward that it may be ***intra vires*** of a Colonial or Dominion Legislature to delegate power to make regulations "ancillary to legislation." There is no power, it has been suggested, "to pass skeleton legislation and empower the Government to clothe the bare bones " Such a process, it has been argued, is not delegation but abdication, *i e.*, it cannot create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence. The Privy Council gave some countenance to this doctrine in what is familiarly known as the Referendum case in the following passage: "It does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence". The recent decision of the Privy Council in *Shannon* v. *Lower Mainland Dairy Products Board,* L.R. (1938) A C. 708 while reiterating the general doctrine that "within its appointed sphere the Provincial legislature is as supreme as any other Parliament and that it is unnecessary to try to enumerate the innumerable occasions on which legislatures, Provincial, Dominion and Imperial have entrusted various persons and bodies with similar powers to those contained in the Act under consideration by their Lordships," cannot be said to have given a quietus to the theory or doctrine of abdication.

I have taken up more time than I intended in trying to speak to you on the subject of the Rule of Law and Administrative and Legislative Delegation. But I shall close my observation with this remark, that, even if full weight is given to the criticisms of foreign and recent English Constitutional writers on the subject of Rule of Law and the recent tendencies in British administrative system, there is no doubt whatsoever that the concept of the Rule of Law continues to be the governing factor in the adjustment of legal relations and the determination of legal rights in the British Commonwealth as also in the American Continent, whose legal system is permeated with and governed by the British jurisprudence.

Before I close I should like to touch on another topic of absorbing interest to the profession. You are aware of the usual criticism that is levelled against the practising lawyer that he is an ultra-conservative and that he seldom ranges himself on the side of law-reform The profession in England has seriously taken up the subject of law-reform and various important changes have been effected in recent times in the Common law of England and antiquated rules out of tune with modern conditions have been done away with. A large scale reform of Hindu law is an imperative necessity at the present day in order to bring the law in line with the social consciousness of the community and to prevent courts

of law becoming the battleground for the settlement of simple questions of succession and family law. Even in the field of economic and social legislation the lawyer can render distinct service to the community by offering constructive suggestions As Lord Macmillan recently remarked in the Rede Lecture he delivered: "We must not sacrifice social benefit because the methods of realisation do not move along the lines of our traditional legal systems or hallowed juristic principles " The duty of the lawyer is all the greater in the field of normal private law.

I would urge upon every Bar Association to take up the question of law-reform and to set up Committees for a detailed consideration of the subject. Let me conclude with the fervent hope and prayer that the members of the profession here will continue to maintain their high traditions with the following reflection of Hanuman, in the Ramayana, on the dignity of law and order which is quoted *in extenso* in Mr. Dikshitar's book on Hindu Administration and Institution: "When a king confers favours truly and awards punishments justly, then only the order of the world becomes well established. He must bestow favours on well-behaved persons who seek his aid prudently On the other hand he must punish those who transgress law and order When the king duly prescribes and shows proper regard to the deserving, then law is well preserved, and good order is maintained."

निग्रहानुग्रहैः सम्यग्यदा नेता प्रवर्तते ।
तदा भवन्ति लोकस्य मर्यादाः सुव्यवस्थिताः ॥ १ ॥
बुद्धया स्वप्रतिपन्नेषु कुर्यात् साधुष्वनुग्रहम् ।
निग्रहं चाप्यशिष्टेषु निर्मर्यादेषु कारयेत् ॥ २ ॥
निग्रहे प्रग्रहे सम्यग्यदा राजा प्रवर्तते ।
तदा भवति लोकस्य मर्यादा सुव्यवस्थिता ॥ ३ ॥"

Captain Kidd at the Microphone.—The B.B.C. recently made a very realistic job of their reconstruction of the trial of Captain Kidd at the Old Bailey in 1701 on charges of piracy and murder. Perhaps for dramatic effect the stress was rather too much on his truculence. One hardly got the impression that here was a man who had honourably followed his calling on the sea till middle age, prosperous, respected and trusted, and that only after that did opportunity turn him into a rather half-hearted pirate. He was no illiterate salt-water thief but could write a letter with style and clarity which compared very favourably with the productions of Lord Belloment, Governor of New England, who arrested him. To

modern ears the form of the indictment for the murder of his gunner probably sounded most strangely over the other. It declared "that the aforesaid William Kidd, with a certain wooden bucket bound with iron hoops of the value of eightpence which he, the said William Kidd, then and there had and held in his right hand, did violently, feloniously, voluntarily and of his malice aforethought beat and strike the aforesaid William Moore in and upon the right part of the head of him the said William Moore, a little above the right ear of the said William Moore, then and there upon the high sea, in the ship aforesaid and within the jurisdiction of the Admiralty of England aforesaid," and so on for a good deal more.—*S.J. 1940, p. 75.*

Maxims.—Maxims admittedly do not hold the place that they once held in the vocabulary of the practitioner, and indeed have by some writers been severely frowned upon, as, for example, by Tennyson, who in "Locksley Hall" speaks of some one "with a little hoard of maxims preaching down a daughter's heart." Coleridge, too, in his extremely attractive little book, "Table Talk," has something to say regarding them and not altogether to their advantage. This book of his is packed with many quaint stories, including that of the man who, during imperfect sleep, listened to the clock as it was striking four, and as it struck, he counted the four, one, one, one, one, and then exclaimed, "Why, the clock is out of its wits; it has struck one four times"! But now revenons a nos moutons, namely, the subject of maxims. After premising that a maxim is a conclusion upon observation of matters of fact, and is merely retrospective, he adds that "a man of maxims only is like a Cyclops with one eye, and that eye placed in the back of his head". This, to be sure, is scarcely complimentary to maxims. Yet something is to be advanced in their favour. For example, their crystallisation of some legal doctrine is eminently useful, seeing that it can be easily memorised. Hence the fact that a work like Broom's Legal Maxims first published in 1845 and which recently attained its tenth edition, has been found of considerable value by the lawyer and student in conveniently memorising for them some of the great principles of our law. Broom stressed their value for this purpose, but he likewise stressed the caution to be exercised in their application.—*L.T., 1940, p. 87.*

BOOK REVIEWS.

INSURANCE LAW AND PRACTICE IN INDIA, by B. N. Singh. Published by the University Book Agency, Lahore. Price Rs. 20.

The Law of Insurance is a subject which is growing in interest to the lawyer. But the layman also has necessarily to understand

something, if not all, about the Insurance Law in view of the fact that insurance as a method of saving is becoming almost the only one to him nowadays. With the coming into force of the Insurance Act of 1938, public interest in India, has become more attracted to the subject. Moreover, the mushroom growth of insurance companies in this country with no adequate basis or provision for funds to meet demands, makes it incumbent upon the lawyer and the layman to view with favour any such strict legislation as the bill introduced in the Legislative Assembly in January, 1937, which has now become law, thanks to the endeavours of the far-sighted legislators.

The volume under review has distinct merits, in that it has not only analysed without flaw the subject under relevant headings such as Premiums, Warranties, Risk Policy, Married Women's Property Act, Accident and Motor Insurance, but has carefully given brief notes under each of the provisions of the Insurance Act of 1938. With the text of the Insurance Act of 1938 and the table of Insurance Rules given *in extenso*, the book is rendered very useful as a compendium of knowledge upon the subject. The exhaustive references to case-law brought up-to-date adds to the immense practical usefulness of a book, which bears the marks of ability and erudition of a high degree.

[END OF VOLUME]

THE MADRAS LAW JOURNAL

I] JANUARY [1940

NOTES OF INDIAN CASES

KUSUM KRISHNAJI PANSE *v.* KRISHNAJI ANANT PANSE : I.L.R. 1939 Bom. 396.

In this case, the learned judges have examined the basis and limits of an unmarried daughter's right to maintenance and the expenses for her marriage as against her father under the Hindu Law. They have held that her right to maintenance is a legal right which is only personal against her father during his life-time and that it is conditional on the minor daughter living under his protection and control. They hold that it does not rest on the daughter having any right in the joint family property in the father's hands. They also hold that the father is only under a religious and not a legal duty to meet the expenses of her marriage. When however the father dies, both the right to maintenance and marriage expenses become according to the learned judges a legal right charged on the family properties in the hands of her brothers. In the case under notice, the claim was made by the unmarried daughters who were living away from their father without any reasonable cause and under their maternal grandfather's protection and the learned judges have held that under the circumstances they were not entitled to claim either for their maintenance or marriage expenses against their father.

So far as the right to maintenance is concerned, infant children are entitled to maintenance from their parents under every system of jurisprudence and the Hindu Law is no exception to it. The right of unmarried daughters to be maintained by their father has been recognised under the Hindu Law and referred to in a number of decisions. See *Tulsha* v. *Gopal Rai*[1], *Bai Mangal* v. *Bai Rukhmini*[2],

1. (1884) I.L.R. 6 All. 632.

2. (1898) I.L.R. 23 Bom. 291.

Gudimetla Venkataraju v. *Bollozu Kotayya*[1], *Cherutty* v. *Nagamparambil Raru*[2], *Narainjan Singh* v. *Gurumukh Singh*[3]. The basis of the right was however not fully examined in those cases but was considered by the Madras High Court in *Subbayya* v. *Ananta Ramayya*,[4] where Mr. Justice Ramesam pointed out that it rests on the daughter's right in the joint family property which formerly was a right to claim a share but has since dwindled into a claim for maintenance and a marriage portion. He has also pointed out that Verse 14 of Chapter I, Section VII of the Mitakshara, which has been translated as "Therefore, after the decease of the father, an unmarried daughter participates in the inheritance. But before his demise, she obtains that only, whatever it be, which her father gives; since there is no special precept respecting this case. Thus all is unexceptionable" is in no way inconsistent with a daughter's present right in the properties, because, even in the case of sons the Mitakshara did not recognise a right to partition of ancestral joint family properties against their father's will in his life-time, except in a very restricted and specified class of cases. Compare *Srinivasa Iyengar* v. *Thiruvengadathaiyengar*,[5] That under the Mitakshara, a son has all along a right in the joint-family properties by birth along with his father is one of its cardinal principles. Thus the right in the properties and the absence of a right to partition in the father's life-time against his will are not mutually destructive.

Further, there does not seem to be any principle in law by which a mere personal legal obligation on the part of the father to provide maintenance and marriage expenses for his unmarried daughter could attach itself to the properties in the hands of his sons after his death. In this connection it is interesting to note that even an illegitimate son's right to maintenance out of the joint family properties has been rested by the Privy Council on the proprietary right in the properties, as in the case of widows and disqualified heirs in *Vellaiyappa Chetty* v. *Natarajan*[6], and not merely by reason of the special text without assigning any other reasons for the claim for maintenance.

If the right to maintenance and marriage expenses of an unmarried daughter is only personal against the father and against the family properties only in the hands of her brothers after his death, it is difficult to see how the marriage expenses could have been

1. (1912) 23 M.L.J. 223.
2. (1939) 1 M.L.J. 683.
3. A.I.R. 1937 Lah. 76.
4. (1928) I.L.R. 53 Mad. 84 : 57 M.L.J. 826 (F.B.).
5. (1912) I.L.R. 38 Mad. 556 : 25 M.L.J. 644.
6. (1931) I.L.R. 55 Mad. 1 : 58 I.A. 402 : 61 M.L.J. 522.

awarded to a brother's daughter as against her uncles as in *Vaikuntam Ammangar* v. *Kallapiran Ayyangar*[1].

Again the fact that there is a personal obligation on the father to maintain his unmarried daughters does not negative their right against the joint family properties. Even in the case of a Hindu wife who has a personal right against her husband for maintenance irrespective of the possession of any properties, she has like a widow a right to a charge for maintenance on the family properties in the hands of the other members of the family. See *Ramabai* v. *Trimbak*,[2] *Rajalakshmi Devi Amma* v. *Naganna Naidu*,[3] and *Gopala Pattar* v. *Parvathi Ammal*[4].

The learned judges have gone further and held that an unmarried daughter's right to maintenance against her father which according to them is only personal is dependent upon her living with him and under his control. It cannot be denied that there are Hindu Law texts, which enjoin on the children obedience to their father. There are means by which a father can under the law resume the custody and control of his minor daughters who are unmarried. It is open to question whether the right of the daughters to maintenance and marriage expenses and their obligation to obey and subject themselves to their father's control are reciprocal as the learned judges have held or are independent of each other. This limitation has not been laid down in any prior decisions, as the learned judges themselves recognise.

Coming to the claim for marriage provision against the father, the learned judges have held that the father's obligation is only religious and not legal though in the hands of his sons it becomes not only a legal obligation but also one attaching to the properties under the text of the Mitakshara above referred to. They refer to *Sundari Ammal* v. *Subramania Iyer*,[5] in support of the proposition that a Hindu father is not under an obligation to marry his daughter. Apart from the fact that this decision has not gone unchallenged, see *Ganga Baksh Singh* v. *Ahbaran Singh*[6], it has only been understood to lay down that a Hindu father is not under a personal obligation to marry his daughter but is only bound with reference to the family assets. *See* Mayne's Hindu Law, 10th Edition, page 190 (foot-note). Otherwise, it is not easy to reconcile *Sundari Ammal* v. *Subramania Iyer*[5], with *Malayandi* v. *Subbaraya*,[7] and the other cases which lay down that

1. (1900) I.L.R. 23 Mad. 512 : 10 M.L.J. 111.
2. (1872) 9 Bom.H.C.R. 283.
3. (1924) 21 L.W. 461 at page 468.
4. A.I.R. 1929 Mad. 47.
5. (1902) I.L.R. 26 Mad. 505.
6. (1916) 19 O.C. 113.
7. (1910) 21 M.L.J. 521.

an alienation by a father to meet the debts incurred for his daughter's marriage is binding on the other members of the family. If the decision of the Madras High Court in *Subbayya* v. *Ananta Ramayya*,[1] is correct, the daughter's right to marriage expenses is based on her right in the family properties in the place of her original right to a share and she can enforce it even against her father and the family properties in his hands. We venture respectfully to submit that the historical considerations of the change of the law in this respect adverted to in *Subbayya* v. *Ananta Ramayya*,[1] have not been given full weight or met by the learned judges in this case. The learned judges have not also referred to any special texts applicable to the Bombay Presidency over-riding the Mitakshara so as to render reasoning and decision in *Subbayya* v. *Ananta Ramayya*,[1] inapplicable to Bombay.

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16. (1928) I.L.R. 53 Mad. 84 : 57 M.L.J. 826 (F.B.).

PRAMATHA NATH PRAMANIK *v.* NIRODE CHANDRA GHOSH, I.L.R. (1939) 2 Cal. 394.

This case deals with the admissibility of the copies of assessment orders under the Indian Income-tax Act and the learned judge has held that certified copies of the assessment orders of a partnership are inadmissible in evidence at the instance of one of the partners against the other as showing the share to which each one of them is entitled in the partnership. The objection was based on the terms of S. 54 of the Indian Income-tax Act which enacts in effect that the proceedings before an Income-Tax Officer are confidential and no official can be called to produce any of the documents before the Court. In coming to the conclusion that the certified copies of the assessment orders are inadmissible in evidence, the learned judge has relied on two decisions, one of the Bombay High Court in *Devidatt Ramniranjandas* v. *Shriram Narayandas*[1], and the other of the Rangoon High Court in *Anwar Ali* v. *Tafozal Ahmed*[2], Both these decisions have recently come up for consideration before the Madras High Court in *Pentapathi Venkataramana* v. *Pentapathi Varahalu*[3], and their Lordships Mr. Justice Varadachariar and Mr. Justice Pandrang Row have declined to follow these cases and held that the certified copies are admissible in circumstances almost similar to those in the present case before the Calcutta High Court. The learned judges of the Madras High Court are inclined to take the view that the later portion of cl. (1) of S. 54 of the Indian Income-tax Act really bring out the meaning of the first portion that the documents are confidential, namely that the Income-tax authorities are not permitted to disclose them. Again their observations on the meaning and scope of S. 76 of the Indian Evidence Act on which the learned Judge in the case under notice has largely rested his objection to the admissibility of the certified copies deserve serious consideration. The learned judge in this case recognises that assessment orders and statements recorded by the Income-tax officer are public documents within the meaning of S. 74 of the Indian Evidence Act.. If so, if a person obtains even illegally a copy or certified copy of such a public document, there is no prohibition in the Indian Evidence Act or the Income-tax Act against its admission in evidence. The first portion of S. 76 of the Indian Evidence Act only lays down that certified copies of certain documents may be given. It does not prohibit the granting of copies in other cases, much less does it render such certified copies inadmissible in evidence. There is the further reason given by the learned judges

1. (1931) I L.R 56 Bom 324   2. (1924) I L R. 2 Rang 391
3 1939 M.W.N. 1028.

in the Madras Case that the records of the Income-tax proceedings of a partnership belong to all the partners and there is no objection to any one of them getting a copy and using it. Any argument merely based on the possible intention of the legislature rendering the document inadmissible apart from the language of S. 54 is to some extent an uncertain ground of decision. The question is so fully considered in the recent Madras Case that when the question comes up in any future case, considerations adverted to by the learned judges in the case will have to be given their full weight. We should add that in the light of the decision in *Pentapathi Venkataramana* v. *Pentapathi Varahalu*[1] it is doubtful whether the decision of the single judge of the Madras High Court in *Noone Varadarajam Chetty* v. *Vutukuri Kanakiah*[2], can be considered to be good law.

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1. (1939) M.W.N. 1028 2. (1939) 1 M.L.J 791.

HAR NARAIN MISRA *v.* KANHAIYA LAL LOHAWALLA, I.L.R. (1939) 2 Cal. 425.

The question in this case was whether where a suit was instituted against a company which had been ordered to be wound up, without the leave of the court, the proceedings, in the suit could be validated by a subsequent leave of the court and the learned judge answered it in the negative.

The prohibition against commencing a suit without the leave of the court in such a case is contained in S.171 of the Indian Companies Act. There are also statutory provisions imposing a similar prohibition in S. 28 of the Provincial Insolvency Act and S. 17 of the Presidency Towns Insolvency Act. In all these cases, the weight of Indian decisions is to the effect that as the statutes prohibit the commencement and not merely continuance of the suit, without the leave of the court, the grant of leave of the court subsequent to the suit being commenced cannot validate the suit and the proceedings in the same. Re : *Steel Construction Co., Ltd.,*[1] *Peoples Bank of Northern India, Ltd., Lahore,* v. *Fateh Chand and Co., and another*[2], *Dawood Mohideen Rowther* v. *Sahabdeen Sahib*[3], *Jehangir Cursetji Mistri* v. *Kastur Pannaji Oswal*[4], *A.K.R.M.M.C.T. Chettiar Firm* v. *S.E. Munne*[5]. The learned judge in the present case under notice has observed that the Bombay High Court has taken a different view. See *Muhammad Haji Essack* v. *Abdul Rahiman*[6] *and Bhimaji Bhobhutmal* v. *Chunilal Jhaverchand*[7]. But since then, the Bombay High Court has expressed the opinion in *Jehangir Cursetji Mistri* v. *Kastur Pannaji Oswal*[4], that a subsequent leave cannot validate the prior suit and followed the decisions in In re *Dwarkadas Tejbhandas*[8], *and Maya Ookeda* v. *Kuverji Kurpal*[9]. It has also been held further that where a decree was obtained in favour of the plaintiff in a suit against a company instituted without leave, the decree would be a nullity and not binding on the liquidator of the company. In the matter of *Allahabad Trading and Banking Corporation, Limited*[10]. the High Court of Allahabad has however held that, as a suit can be brought subsequently with the requisite leave of Court, it is not necessary to dismiss the prior suit commenced without leave, but that the same may be continued after leave is obtained even subsequent to the filing of the suit, treating it as a suit filed after the grant of the leave. *People's Industrial Bank, Limited* v. *Ram Chandra Shukla*[11]. If, however, at the date when the leave is obtained, the suit would be time-barred, the original suit, even according to the Allahabad High Court, cannot be validated. *Firm Sarju Prasad-Bhagwati Prasad Sah* v. *Rajendra Prasad*[12].

As regards the English Law on the point, Sir N.N.Sircar and Mr. Sen in their commentaries on the Indian Companies Act observe at page 464 that the commencement of an action without leave after the winding up would not result in a nullity of the proceedings, but that the defendants' remedy is only to apply for a stay of the pro-

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1. (1935) 40 C.W N. 312.
2. A.I.R. 1936 Lah 401.
3. (1937) 2 M.L J 223.
4. A.I.R. 1939 Bom. 344.
5. A.I.R. 1928 Rang. 326.
6. (1916) I.L.R. 41 Bom. 312.
7. (1931) I.L.R. 57 Bom. 623.
8. (1915) I.L.R. 40 Bom. 235.
9. A.I.R. 1932 Bom. 338.
10. (1927) I.L.R. 50 All. 419.
11. (1929) I.L.R. 52 All. 430.
12. A.I.R. 1937 All. 271 : I.L.R. 1937 All. 344.

ceedings. We are not sure that the decisions referred to by the learned authors fully support this conclusion because in the case of *Gray* v. *Raper*[1], the action against the makers of the note had already been pending before the commencement of the order for winding up and therefore there was no question of the commencement of any action after the commencement of the order for winding up and further the executants of the promissory note were held in that case liable personally on the promissory note and no question of the liability of the property of the company was considered. In *Graham* v. *Edge*[2], there was an order for the discontinuance of the action brought without leave against an official liquidator in the winding up and a discontinuance of an action under the English Law seems to correspond to the withdrawal of the action, though the plaintiff could commence another action after satisfying the necessary formalities. Reference may be made in this connection to O. 26, r. 1 of the Rules of the Supreme Court which is to some extent analogous to O. 23, r. 1 of the Civil Procedure Code. In *Hall v. Old Talargoch Lead Mining Company*[3], no relief was asked for against the company beyond what the law allowed or which was inconsistent with the winding up action and the action was not against the company alone but against the company and other persons for the return of the amount by the directors who had by misrepresentation in the prospectus recovered monies from the plaintiff and there was no consideration of the question by the Vice-Chancellor of the effect of the commencement of any action without leave where it was required under the statute. It is not therefore clear that the English Law is in any way different from the Indian Law on the point.

By way of analogy, we may refer to the cases under S. 92 of the Civil Procedure Code where it has been held that the consent in writing of the Advocate-General obtained subsequent to the institution of the suit would not validate the proceedings in such a suit. See *Gopal Dei* v. *Kanno Dei*[4], and *Abdul Rehman* v. *Cassum Ebrahim*[5]. Reference may also be made in this connection to the provisions of S. 18 of the Religious Endowments Act of 1863.

In cases, however, where there is no such statutory prohibition, as in suits against receivers without the leave of the court which appointed the receiver, it has been held that the proceedings in such suits are not without jurisdiction and can be validated by the leave of court subsequently granted. See *Ammukutti* v. *Manavikraman*[6], *Jagana Sanyasiah* v. *Atchanna Naidu*[7], *Kalyanasundaram Iyer* v. *Narasimha Aiyangar*[8], *Jabbar Ali Sardar* v. *Monmohan Pandey*[9], and *Jamsedji F. Shroff* v. *Husseinbhai Ahmedbhai*[10].

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1. L.R. (1866) 1 C.P.C. 694.
2. (1888) 20 Q.B.D. 538.
3. (1876) 3 Ch. D. 749.
4. (1903) I.L.R. 26 All. 162.
5. (1911) I.L.R. 36 Bom. 168.
6. (1920) I.L.R. 43 Mad. 793.
7. (1921) 42 M.L.J. 339.
8. (1922) 44 M.L.J. 427.
9. (1928) I.L.R. 55 Cal. 1216.
10. (1919) 22 Bom.L.R. 319.

CHIMANRAM MOTILAL *v.* JAYANTILAL CHHAGANLAL, I.L.R. (1939) Bom. 616.

This case brings out clearly one of the essentials of the existence of a partnership in law. When the question arises whether in any particular case, there is a partnership in law, it has to be decided under S. 6 of the Indian Partnership Act by having regard to the real relation between the parties as shown by all relevant facts taken together. One of the relevant essentials is what is laid down in S. 4 of the Act that the business should be carried on by all or any of them acting for all. This mutual agency on the part of the partners has been recognised as one of the requisites for the existence of a partnership. Reference may be made in this connection to *Janki Nath Paul* v. *Dhokar Mall Kedar Bux*[1], where a bench of the Patna High Court has noticed this as a necessary requisite for a partnership. The case under notice has considered the matter more fully. This requirement was not specifically laid down in the definition of partnership in S. 239 of the Indian Contract Act, though it was recognised as essential and it has been expressly incorporated in the definition of the term in S. 4 of the Indian Partnership Act. A fuller discussion of the point will be found in Mr. N. Rajagopalachariar's Law of Partnership, pp. 37 and 38. It must however be noticed that this mutual agency may be restricted or provided against under the provisions of S. 20 of the Act, which corresponds to S. 251 of the Indian Contract Act. But this is an exception which really proves the general rule, as pointed out at p. 38 of the book referred to above.

DATTATRAYA CHANDRAYA BACHUWAR *v.* K. L. BAWACHKAR, I.L.R. (1940) Bom. 1.

The question considered in this case is whether a second appeal lies against an appellate decision given on application made under Ss. 53 and 54 of the Provincial Insolvency Act, 1920. The learned judges in the case under notice have answered the question in the negative.

The point becomes arguable by reason of the wide language used by the legislature in S. 4 of the Act which empowers the Insolvency Court to decide all questions whether of title or of priority or of any nature whatsoever, and whether involving matters of law or fact which may arise in any case of insolvency coming within the cognizance of the Court or which the Court may deem it expedient or necessary to decide for the purpose of doing

1. A.I.R. 1935 Pat. 376.

complete justice or make a complete distribution of property in any such case. These are words of the widest amplitude and it cannot be said that setting aside a voluntary alienation or a fraudulent preference by the insolvent will not fall within the ambit of the section. S. 4 also enacts that it is subject to the provisions of this Act and there is nothing contrary to its terms in S. 53 or 54 of the Act which may be said to qualify the provisions of S. 4. It is therefore open to argument that all orders under Ss. 53 and 54 are also decisions under S. 4 of the Act for which a right of second appeal is provided under the second proviso to sub-S. (1) of S. 75 of the Provincial Insolvency Act. While there is a considerable plausibility in this argument, it cannot be doubted that it will render the other parts of S. 75 as to appealability and the finality of the decisions of the first appellate Court under the section wholly meaningless. Further, it is a well-known rule of statutory interpretation that a special rule will exclude the operation of the general rule. These are the considerations which made the learned judges to hold that no second appeal lies in cases falling under S. 53 or 54 of the Act and they follow the decision of the Madras High Court in *Alagirisubba Naik* v. *Official Receiver of Tinnevelly*[1], where the learned judges considered the question for the first time and came to a similar conclusion. The same view was taken by the Madras High Court in later decisions in *Ramasami Nayakar* v. *Venkatasami Nayakar*[2] and *John A. David* v. *A. L. A. Alagappa Chettiar*[3]. It may be mentioned in this connection that a single judge of the Bombay High Court applied the *ejusdem generis* rule in construing S. 4 of the Act, a view which on this point is contrary to the one taken by the Madras High Court in *Alagirisubba Naik* v. *Official Receiver of Tinnevelly*[1] referred to above and followed in the decision under notice.

[END OF VOL. I]

1. (1931) 61 M.L.J. 820: I.L.R. 54 Mad. 989.
2. (1932) 65 M.L.J. 298.
3. A.I.R. 1935 Mad. 432.

IRAPPA LOKAPPA VASTRAD *v.* RACHAYYA MADIWALAYYA, I.L.R. (1940) Bom. 42.

This decision raises an interesting question in the Hindu Law of adoption. There were two brothers who were members of an undivided Hindu family governed by the Mitakshara Law. The elder brother died leaving behind him a widow. The other brother subsequently entered into a partition of the joint family properties with his own son. Then the widow of the deceased elder brother adopted a son to her husband and the question was whether the adopted son could claim a half share in the properties which belonged to the joint family composed originally of the two brothers. The learned judges have held that the adoption was valid, but that the adopted son could not claim a share in the properties which once belonged to the joint family.

This somewhat curious result has been laid down as following from the Full Bench decision of the Bombay High Court in *Balu Sakharam* v. *Lahoo Sambhaji*[1]. In that case, the majority of the judges in the Full Bench held that where on the death of the last surviving coparcener, the family property vests in the heir of such coparcener and subsequently the widow of another coparcener adopts, the adoption would be valid but it would not vest the property in the adopted son to the exclusion of such heir and would not divest such heir of the property already vested in him. Mr. Rangnekar, J., who was the dissenting judge in that case held that the adoption itself was invalid on the property passing by inheritance to the last coparcener's widow and that therefore there was no question of divestment. He further held that if the adoption was valid, the adopted son would divest the property already vested in the heir. This view of Rangnekar, J., was substantially what was held in an earlier decision of the Bombay High Court in *Chandra* v. *Gojarabai*[2]. After the decision of the Privy Council in *Amarendra Mansingh* v. *Sanatan Singh*[3], it can no longer be said that by reason of any possible divestment of property whether from a surviving coparcener or an heir an adoption is invalid, because their Lordships have pointed out that unless there is a son's son or a son's widow who could perpetuate the deceased person's line as in *Bhoobun Mayee Debia's case*[4], *Padmakumari Debi* v. *Court of Wards*[5] and *Ramachandra* v. *Shamrao*[6], a Hindu widow could adopt to her husband. Judged by this test which is based on spiritual benefit, there can be no objection to a Hindu widow adopting when the last surviving collateral coparcener has died

1. I.L.R. (1937) Bom. 508: 39 Bom.L.R. 382 (F.B.).
2. (1890) I.L.R. 14 Bom. 463.
3. (1933) 65 M.L.J. 203: L.R. 60 I.A. 242: I.L.R. 12 Pat. 642 (P.C.).
4. (1865) 10 M.I.A. 279.
5. (1881) L.R. 8 I.A. 229: I.L.R. 8 Cal. 302 (P.C.).
6. (1902) I.L.R. 26 Bom, 526 (F.B.).

leaving behind him his heir who takes by inheritance from him. Once the adoption has been held to be valid, it would seem to follow that the adopted son would as regards legal rights to the property be in the same position as an *aurasa* son except in respect of properties which had been validly alienated by the limited owner or heir prior to his adoption. But the majority of the learned judges in the Full Bench case in Bombay held that this would be the result only if the property continued in the hands of the coparceners but not if on the death of the last surviving coparcener it passed by inheritance. There is no warrant for it in the latest decisions of the Privy Council. Indeed the cases themselves were those of strict inheritance and not of survivorship or succession in a joint family. The property in *Amarendra Mansingh* v. *Sanatan Singh*[1] was in the hands of the deceased son as a separate impartible estate and not a joint impartible estate; otherwise it would be impossible to see how the estate could have gone to the mother who however was excluded by custom and the property was therefore inherited by a collateral coparcener. The learned Editor of the 10th Edition of Mayne's Hindu Law at pages 237 and 238 and also at page 268 has pointed out how the view of the majority of the judges in *Balu Sakharam* v. *Lahoo Sambhaji*[2], is based upon a misunderstanding of the decisions of the Privy Council in *Amarendra Mansingh* v. *Sanatan Singh*[1] and *Vijayasingji Chhatrasingji* v. *Shivsangji*[3]. The view of the Full Bench in *Balu Sakharam* v. *Lahoo Sambhaji*[2], to the effect that the adoption would be valid but would not divest the properties in the hands of the heir has not found favour with the learned editors of Mulla's Hindu Law, 9th Edition at page 537. The view of the Full Bench of the Bombay High Court has not been followed by the Nagpur High Court in *Mst. Draupadi* v. *Vikram Krishna*[4]. The learned judges have held after an examination of the Hindu Law on the point that in such a case the adoption would be valid and that the adopted son would divest the properties in the hands of the heir of the last coparcener.

As regards the effect of partition among the members of the coparcenery, the application of the principle of *Chandra* v. *Gojarabai*[5], to such a case as regards the validity of the adoption was doubted by the Madras High Court in *Panyam* v. *Ramalakshmamma*[6]. See also *Madana Mohana* v. *Purushothama*[7]. In

1. (1933) 65 M.L.J. 203: L.R. 60 I.A. 242: I.L.R. 12 Pat. 642 (P.C.).
2. I.L.R. (1937) Bom. 508: 39 Bom.L.R. 382 (F.B.).
3. (1935) 68 M.L.J. 701: L.R. 62 I.A. 161: I.L.R. 59 Bom. 360 (P.C.).
4. I.L.R. (1939) Nag. 88: A.I.R. 1938 Nag. 423.
5. (1890) I.L.R. 14 Bom. 463.
6. (1931) 62 M.L.J. 187: I.L.R. 55 Mad. 581 at 590.
7. (1914) 27 M.L.J. 306: I.L.R, 38 Mad. 1105 at 1118.

the Bombay High Court, a distinction has been drawn between cases where the partition took place between the branch of the family to which the widow belonged and another branch in which case a son adopted by the widow would take his father's share in that branch, as in *Chanbasappa* v. *Huchappa*[1] and the cases where the partition is between members of the branch to which the widow herself belonged. The case under notice falls under the latter category and it has been held by the learned judges that the adoption would not divest the estate in the hands of the separated members. If the view put forward in the latest edition of Mayne's Hindu Law and *Mst. Draupadi* v. *Vikram Krishna*[2] is correct, the decision under notice will be unsound equally with the view of the Full Bench in *Balu Sakharam* v. *Lahoo Sambhaji*[3].

The points noticed above will lose much of their practical importance after the coming into force of the Hindu Women's Rights to Property Act of 1937 under which a Hindu widow in a joint family will take her husband's share and there will therefore be no divestment of third person's rights. The adopted son will presumably take the adoptive father's share along with the widow under the Act.

[END OF VOLUME]

1. (1938) 40 Bom.L.R. 1185.
2. I.L.R. (1939) Nag. 88: A.I.R. 1938 Nag. 423.
3. I.L.R. (1937) Bom. 508: 39 Bom.L.R. 382 (F.B.).

THE
MADRAS LAW JOURNAL.

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NOTES OF RECENT CASES

Abdur Rahman, J. S. A. No. 876 of 1936
15th November, 1939.

Transfer of Property Act (IV of 1882), S. 53—Alienation with intent to defeat or delay transferors creditors—Relief to the extent of small portion of consideration proved to have been paid by alienee—If can be granted.

Where it is found that an alienation is made with intent to defeat or delay creditors, the alienee being a party to the fraud cannot be permitted to urge that a relief to the extent of the consideration proved to have been paid by him, should be granted to him. The alienation being bad, the whole of it has to be avoided at the option of any defeated or delayed creditor and not a portion merely.

K. Kuttikrishna Menon for Appellant.

Respondents not represented.

K.S.

Lakshmana Rao, J. Crl. R. C. No. 422 of 1939.
16th November, 1939.

Criminal Procedure Code (V of 1898), Ss. 517 and 523—Confiscation of properties seized by Police during investigation and sent to the Magistrate —When proper.

Petitioner made a complaint that he was robbed of jewels and documents while asleep in his house by the several accused. The police came to the house of the petitioner for investigation whereupon petitioner reported that there was no theft nor robbery and produced all the articles and handed them over to the police stating that his complaint was not true. The police sent up the goods to the Magistrate and recommended the throwing out of the complaint as false. An order was accordingly passed and further the articles were confiscated to Government. In revision, the Sessions Judge held that the order of confiscation was proper within the meaning of the ruling in 24 M.L.J. 1 in as much as they were found by the police under circumstances which create suspicions of the commission of the offence of false charge. On revision *held*, that the articles were not used by the petitioner

for foisting a case against the accused but for showing that his own complaint was not true. In the result the confiscation order was set aside.

K. G. Srinivasa Aiyar for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.C.

Leach C. J. and Krishnaswami Aiyangar, J. Appeal No. 251 of 1939.
21st November, 1939.

Court-Fees Act (VII of 1870), Sch. II, Art. 17 (A)—Suit filed in Munsif's Court transferred to Subordinate Judge's Court to be tried along with a suit in latter Court—Dismissal of both suits by a common judgment—Appeal to District Judge in suit originally filed in Munsif's Court—Court-fee—If to be as on appeal from decree of Court of Subordinate Judge (Rs. 100) or decree of Munsif's Court (Rs. 15)—Power of appellate Court to correct mistake of lower appellate Court as to Court-Fees.

A suit originally filed in a Munsif's Court was transferred to a Subordinate Judge's Court for trial along with a suit in latter Court. Both the suits were dismissed by a common judgment. In the suit transferred from the Munsif's Court an appeal was filed to the District Judge's Court, with a Court-fee of Rs. 15 (as an appeal from Munsif's decree).

Held, the decree was passed by the Court of the Subordinate Judge and must be declared to be a decree of that Court and under Art. 17 (A) the Court-fee shall be Rs 100. S. 12 (11) gives an appellate Court power when an appeal comes before it to correct a mistake by a lower appellate Court.

K. V. Ramachandra Aiyar for Appellant.

The Government Pleader (*B. Sitarama Rao*) for Respondent.

K.S.

Abdur Rahman, J. S. A. No. 949 of 1936.
24th November, 1939.

Plaintiff asking for injunction restraining interference with his individual right of worship by restraining persons other than Brahmins going further than certain limits in temple—Locus standi—*Madras Hindu Religious Endowments Act (II of 1927), S. 73—How far a bar.*

A plaintiff asking for the relief that he should be allowed to exercise his right to worship in the manner in which he has been doing it heretofore and that his deity and temple should not be defiled by allowing caste Hindus other than Brahmins to proceed beyond a particular portion of the temple in contravention of Sastras, Agamas and longstanding usage, has an individual right and since right of worship is a civil right he has a *locus standi* to maintain an action for injunction restraining interference with his rights.

S. 73 of Hindu Religious Endowments Act is not applicable to cases of individual rights.

N. Sivaramakrishna Aiyar for Appellant.

M. Balasubramania Mudaliar for Respondent.

K.S.

Horwill, J., S. A. No. 843 of 1936.
28th November, 1939.

Civil Procedure Code (V of 1908), S. 11, (Expln. IV)—Res judicata—*Might and ought—Paramount title—Mortgage of undivided ⅓rd share of co-*

*parcener—Allotment of mortgaged properties to other co-parceners at a subsequent partition—Non-mortgagor impleaded as defendants—*Ex parte *decree against mortgagor and in respect of the original mortgaged properties—Symbolical delivery inspite of objections of defendants in execution—Mortgagee decree-holder auction-purchaser—Subsequent suit for general partition—Contention of non-mortgagor Defendants that property in their hands not liable for the mortgage debt--Whether* ex parte *decree operates as* res judicata.

Subsequent to a mortgage of his undivided 1/3rd share by one of the co-parceners a partition was entered into whereby the mortgaged properties were allotted to the other co parceners. In a suit on the mortgage there was no specific allegation in respect of the partition and the non-mortgagors were also impleaded as defendants who were *ex parte.* An *ex parte* decree was passed against the mortgagor and in respect of the undivided 1/3rd share of the mortgaged properties. Inspite of objections by the other defendants in execution symbolical delivery was ordered.

In a suit for general partition by the mortgagor-decree-holder-auction purchaser the other defendants raised the plea that their share could not be proceeded against. As against the decree-holder's contention that the other defendants might and ought to have raised the present contention in the mortgage suit and that the *ex parte* decree operated as *res judicata* in the present suit,

Held, that it was not barred by *res judicata* and that the question of paramount title could not have been decided in the mortgage suit.

1937 A.L J. 536, I.L.R. 24 All. 423, 52 M.L.J. 52, A I.R. 1927 Mad. 945 referred to.

Held further, the contention that the order in execution negativing defendant's objections was binding upon the defendants, could not be raised for the first time in Second Appeal.

R. Krishnaswami Aiyangar for Appellant.

S. Panchapakesa Sastri and *K. Venkateswaran* for Respondents.

K.S.

The Chief Justice and Krishnaswamy Aiyangar, J.,
5th December, 1939.

L. P. A. No. 11 of 1939

Civil Procedure Code (V of 1908), O. 22, r. 10—Agreement between financier and an unsuccessful plaintiff in a partition suit to provide funds to file and prosecute appeal—Condition for financier reimbursing himself from properties which may be got in the event of success in appeal and for a half share therein—Death of appellant—If financier entitled to come on record as legal representative of appellant and continue appeal.

On the dismissal of his suit for partition, *A* the plaintiff entered into an agreement with *N* a financier whereby the latter agreed to provide funds for filing and prosecuting the appeal; the agreement further provided that *N* was to reimburse himself from out of the properties which may be got by *A* in the event of the success in the appeal and *N* was to get half of *A's* share in the properties. The agreement further empowered *N* to get himself impleaded as a party to the appeal. *A* died after the filing of the appeal and his son declined to prosecute the appeal. On *N's* application to bring himself on record as legal representative under O. 22, r. 10, Civil Procedure Code and continue the appeal,

Held, that there was no assignment of present interest and *N* could not come on record and continue the appeal.

I.L.R. 35 All. 273 (P.C.) referred to.

K. Rajah Aiyar and *N. Somasundaram* for Appellant.

T. V. Muthukrishna Aiyar and *K. Venkateswaran* for Respondents.

K.C.

Lakshmana Rao, J. Cr. R. C. No. 977 of 1939.
13th December, 1939. (Case Refd. No. 48 of 1939).

Madras Borstal Schools Act—If applicable to persons other than adolescent males.

Madras Borstal Schools Act have been applied only to adolescent offenders of the male sex.

K. Venkataraghavachari for the Crown.

Accused not represented.

K.S.

Burn, J. C. R. P. No. 159 of 1937.
14th December, 1939.

Limitation Act (IX of 1908), Art. 182 (5)—Petition for attachment without giving particulars required by Civil Procedure Code, O. 21, r. 13—If in accordance with law to save limitation under Art. 182, cl. (5) of Limitation Act in another execution petition.

An execution petition containing a prayer for attaching immoveable properties, but in which no particulars of the properties to be attached were given as required by O 21, r. 13, Civil Procedure Code, is not one in accordance with law within the meaning of Art. 182, cl. (5) so as to save limitation in respect of another execution application.

T. E. Ramabhadrachari for Petitioner.

T. R. Srinivasan for Respondent.

K.S.

Pandrang Row and Abdur Rahman, JJ. Appeals Nos. 156, 166, 179 and
16th October, 1939. 191 of 1936.

Hindu Law—Widow—Maintenance—Widow's private means or Stridhana—If to be taken into consideration in fixing rate of maintenance.

On principle there seems to be no reason why a widow's stridhanam property or private income should be taken into consideration, if her right to maintenance is absolute and the duty of persons who are in possession of her husband's estate unqualified and unconditional.

P. V. Rajamannar and *K. Subba Rao* for Appellants in Appeal No. 156 of 1936 and Respondents in Appeal Nos. 166 and 179 of 1936.

K. Umamaheswaram for Appellant in Appeal No 179 of 1936.
D. R. Krishna Rao for Appellant in Appeal No. 191 of 1936.

P. S. Raghavarama Sastri for Appellants in Appeal Nos. 166 and 179 of 1936 and Respondent in Appeal No. 156 of 1936.

K. S.

The Chief Justice and Krishnaswami Aiyangar, J. L. P. A. No. 29 of 1937.
8th November, 1939.

Hindu Law—Stridhana—Illegitimate daughters of Hindu woman who was not a dancing girl—If entitled to succeed to stridhana of her mother's mother.

The fact that Courts had recognised as between a mother and her illegitimate daughter the right of inheritance was no warrant for the extension of sapindaship to other relations. The illegitimate daughters of a daughter are not entitled to succeed to the stridhana of their maternal-grandmother.

Decision of *Varadachariar, J.*, affirmed.

K. S. Desikan for Appellant.

S. Muthiah Mudaliar for Respondent.

K. S.

Venkataramana Rao and Kunhi Raman, JJ. Appeal No. 318 of 1936.
15th November, 1939.

Madras Impartible Estates Land Act (II of 1904), S. 4—Amounts borrowed by the late holder for maintaining himself—If "necessary purpose"—Borrowing after surrendering the whole estate to son- Debt how far binding on estate.

Where a Zamindar by his own act deprives himself of the income of the Zamindari which he is legitimately entitled to enjoy and out of which he was obliged to defray his maintenance expenses it is not competent for him to incur any debt for his maintenance so as to bind the Zamindari under S. 4 of the Impartibie Estates Act.

S. Ramaswami Aiyar and *C. K. Venkatanarasimham* for Appellant.

T. R. Venkatarama Sastri, A. Swaminatha Aiyar and *S. Thyagaraja Aiyar* for Respondents.

K. S.

[F. B.],
The Chief Justice, Wadsworth and Patanjali Sastri, JJ. C. R. P. Nos. 572 etc., of 1936
15th November, 1939.
N R C

Provincial Insolvency Act (V of 1920), S. 35—Adjudication based on alleged fraudulent preference of one creditor—Finding in proceedings under S. 54 of the Provincial Insolvency Act, that there was no preference—Annulment of adjudication under S. 35—Jurisdiction to make—Failure of debtor to object to adjudication—If bar to application for annulment—S 37—Disposal of assets realised on annulment.

When it is shown that no act of insolvency has in fact been committed the Court can set aside the adjudication on the ground that the debtor ought not to have been adjudged insolvent. The fact that the debtor does not object to an order of adjudication being passed against him is no bar to granting of an application for an order setting aside the adjudication under the provisions of S. 35. When an adjudication has taken place under the Provincial Insolvency Act and it has been shown that no act of insolveney has been committed the Court has no discretion in the matter. It must annul the adjudication. The word used is "shall" and differs from S. 21 of the Presidency Towns Insolvency Act where the word "may" is used.

(1939) 2 M.L.J. 753, overruled.

Under the powers under S. 37 money fraudulently paid by the insolvents after his adjudication but before annulment to an individual having been found to be the result of a fraud were allowed to be distributed rateably between the creditors who had proved in the insolvency. The other assets realised were directed to be delivered to the debtors.

K. Rajah Aiyar M. Krishna Bharati, S. Ramachandra Aiyar for Petitioners.

T. M. Krishnaswami Aiyar, N. Sivaramakrishna Aiyar, K. Kuttikrishna Menon, P. Anandan Nair and *A. C. Sampath Aiyangar* for Respondents.

K. S.

[F. B.]

The Chief Justice, Krishnaswami Aiyangar and Somayya, JJ. S. A. No. 174 of 1936.

16th November, 1939.

Hindu Law—Adoption by widow—Consent of sapindas—Want of consent of daughter's son—If invalidates adoption.

Practice—Division Bench not accepting as correct a decision on a question of law of another Division Bench of same High Court—Necessity to refer to Full Bench.

The only ground on which a daughter's son can really claim to be consulted in an adoption by a widow, is his interest in the property. He is not a member of the family and is only regarded as a sapinda for purposes of succession. Where the widow has received the consent of her husband's nearest agnates the fact that the major son of her daughter did not consent does not invalidate the adoption.

Texts and authorities fully examined.

I.L.R. 43 Mad. 876, 20 L.W. 503 view of Jackson, J., I.L.R. 57 Mad. 41 and Mayne 10th Edn pp. 223-5, followed.

20 L.W 503 (Ramesam, J.'s view) and I.L.R. 49 Mad. 652, overruled

The division bench is a final Court of appeal in an Indian High Court, unless the case is referred to a Full Bench and one Division Bench should regard itself bound by the decision of another Division Bench on a question of law. If a Division Bench does not accept as correct the decision on a question of law of another Division Bench, the only right and proper course to adopt is to refer the matter to a Full Bench.

V. Govindarajachari and *M. Harisarvothama Rao* for Appellant.

P Satyanarayana Rao, V. Subramaniam and *V. Satyanarayana* for Respondent.

K. S.

Stodart, J. S. A. No. 787 of 1936.
17th November, 1939.

Hereditary office of archaka—If immoveable property which can only be conveyed by a registered instrument—Inalienability of right.

A turn of worship by an archaka in a temple is the right to exercise the duties of the office at a stated time and in a certain order. The right is not immovable property which can only be conveyed by a registered instrument. The right is also inalienable except under custom.

P. Somasundaram for Appellants.

Jiddu Lakshmayya for Respondents.

K. S.

Kunhi Raman, J. A. A. O. No. 176 of 1938.
21st November, 1939.

Civil Procedure Code (V of 1908), O. 21, rr. 2 and 53 (3)—Person who attaches a decree—If can exercise the power under O. 21, r. 2 (1) of certifying a payment or adjustment of the decree.

A person who attaches a decree and who comes within the scope of O. 21, r. 53 (3) cannot exercise the power that is vested in the decree-holder himself under O. 21, r. 2 (1) of certifying a payment or adjustment of the decree.

41 C.W.N. 880 and C.M.S.A. No. 136 of 1937 (Madras unreported) followed.

V. Govindarajachari for Appellant.

V. Suryanarayana for Respondent.

K. S.

The Chief Justice and Krishnaswami Aiyangar, J. L. P. A. No. 9 of 1938.
21st November, 1939.

Indian Contract Act (IX of 1872), S. 19, Exception—Vendor deliberately making false statement—If vendee put upon inquiry

A vendor deliberately concealed from a purchaser the fact that he had already granted a lease of the property sold, but the buyer if he had been diligent could have ascertained this.

Held, the absence of exercise of diligence by the buyer was not a defence open to the vendor who had concealed the fact of the execution of the lease in order to deceive the plaintiff and had induced him to enter into the contract.

I.L.R. 52 Bom. 883, disapproved.

I.L.R. 53 All. 374, 43 C.W.N. 347 and I.L.R. 11 Mad. 419, followed.

Decision of *Horwill, J.*, affirmed.

A. Bhujanga Rao and *D. R. Krishna Rao* for Appellant.

Ch. Raghava Rao and *T. Satyanarayana* for Respondent,

K. S.

The Chief Justice and L. P. A. No. 75 of 1938.
Krishnaswami Aiyangar, J.
22nd November, 1939.

Madras Hindu Religious Endowments Act (II of 1927), S. 43—If ousts the jurisdiction of Civil Courts to entertain a suit by a dismissed archaka challenging the correctness of the trustee's action.

In a suit by a hereditary *archaka* challenging the correctness of the action of the trustees in dismissing him, ostensibly on the ground of his suffering from leucoderma but really owing to ill will on the part of the trustees.

Held [affirming the decision of *Wadsworth, J*, reported in (1938) 2 M.L.J. 516.], when the scheme of the Act and the provisions of Ss. 43, 53 and 54 are considered no reasonable doubt can exist that the legislature has used language which is intended to have the effect of ousting the jurisdiction of the Courts. The remedy of the dismissed *archaka* is to appeal to the Temple Committee.

T. V. Muthukrishna Aiyar for Appellant.

M Subbaroya Aiyar for Respondent.

K. S.

Horwill, J. S. A. No. 833 of 1936.
23rd November, 1939.

Civil Procedure Code (V of 1908), S. 64—Debtor undertaking to mortgage specified properties in default of payment of his debt within one month—Subsequent attachment by a decree-holder—Mortgage on default of payment, in pursuance of prior agreement—Priorities.

Where on the date of the attachment there was an enforceable contract to execute a mortgage and the mortgage is executed subsequent to the attachment, the attachment is subject to the mortgage which was executed in pursuance of the contract.

8 M,L.J. 266, I.L.R. 59 Mad. 1 and 21 M.L.J. 82, followed.

V. Govindarajachari for Appellant.

Ch. Raghava Rao and *K. Subramaniam* for Respondent.

K. S.

The Chief Justice and L. P. A. No. 74 of 1938.
Krishnaswami Aiyangar, J.
23rd November, 1939.

Madras Co-operative Societies Act (VI of 1932), S. 51—Award under—Application for execution—Limitation—Article applicable.

By r. 15 (7) (*c*) of the rules framed under the Madras Co-operative Societies Act, the Court shall enforce the award as if it were a final decree of the Court and Art. 182 and not Art. 181 of the Limitation Act applied to execution of an award.

71 M.L.J. 759; I.L.R. (1937) Mad. 495, overruled.

I.L.R. 58 Mad. 760 and I.L.R. 55 Cal. 499, applied.

Decision of *Venkataramana Rao, J.*, affirmed.

N. R. Sesha Aiyar for Appellant.

K. Kuttikrishna Menon for Respondent.

K, S.

Horwill, J. S. A. No. 172 of 1938.
24th November, 1939.

Agricultural lease—Tenant temporarily deprived of the use of the leased land for some time on account of flooding by sea water—Tenant if entitled to abatement of rent.

Where the tenants claimed abatement on the ground that they were temporarily deprived of the use of the leased agricultural land because of flooding by the sea,

Held, an abatement could only be granted where the loss is of a permanent nature.

K. Kuttikrishna Menon for Appellant.

P. Govinda Menon (amicus curiae).

K. S.

Kunhi Raman, J. A. A. A. O. No. 49 of 1938.
24th November, 1939.

Indian Contract Act (IX of 1872), S.135—Scope—Extension of time given to judgment-debtor by District Munsif—If discharges the surety.

The extensions of time given to the judgment-debtor on two occasions by the District Munsif cannot have the legal consequence of discharging the surety under S. 135 of the Indian Contract Act.

I.L.R. 58 Mad. 625, explained and (1938) M.W.N. 1131, referred.

B. S. Ramachandra Rao for Appellant.

A. Venkatasubbiah Chetty for Respondents.

K. S.

Kunhi Raman, J. A. A. A. O. No. 57 of 1937.
27th November, 1939.

*Civil Procedure Code (V of 1908), S. 144—*Archaka *dispossessed in execution of a decree succeeding in appeal—Meantime dismissal of* archaka *by a competent authority—Restitution—If can be granted.*

An *archaka* of a temple who was dispossessed in execution of the decree of the Court of first instance of lands annexed to the office though he succeeded in the appeal was meantime dismissed by a competent authority.

Held, that the *archaka* was not entitled to restitution of the lands annexed to the office.

V. T. Rangaswami Aiyangar for Appellant.

K. Kuttikrishna Menon for Respondent.

K. S.

The Chief Justice and Krishnaswami Aiyangar, J. L. P. A. No. 86 of 1938.
28th November, 1939.

Madras Estates Land Act (I of 1908), S. 26 (3)—Applicability—Landholder's predecessors in title fixing rent (which was lower than lawful rent) under compromise decree—Patta and muchilika fixing the prevailing rate—Distraint for rent—Applicability of S. 26 (3)—Validity of distraint.

The fact that in 1922 the rent was fixed by a compromise decree of the Court would not in itself prevent S. 26 (3) operating. If the rate of rent granted under compromise decree by the predecessors in title was lower than the rent ruling on such or similar land in the neighbourhood, S. 26 (3) must come into operation. The holders of the land are not bound by their

predecessors' contract and are entitled to distrain for rent which was payable under the patta and muchilika and which represented the lawful rate and the tenant is not entitled to bring a suit to set aside the distraint.

P. Satyanarayana Rao for Appellant.

V. Govindarajachari for Respondent.

K. S.

The Chief Justice and Krishnaswami Aiyangar, J. L. P. A. No. 82 of 1938.

28th November, 1939.

Madras District Municipalities Act (V of 1920), S. 93 (1)—Licensed distiller having one of his depots in charge of an agent within a municipality selling arrack to licensed retail dealers—If transacts business within municipality and if liable to pay profession tax.

The respondent, a licensed distiller owned an arrack distillery in Bellary. Under his license he was required to maintain depots for the sale of arrack at various places in the district. One of those places was Adoni The depot at Adoni was in charge of an agent of the respondent and he sold arrack to licensed dealers. The money received in respect of arrack sold at Adoni depot was paid by the respondent's agent into the treasury the same evening.

Held [reversing the decision of *Wadsworth, J.*, reported in (1938) 2 M.L.J. 1035.], in the circumstances the respondent transacted business in Adoni within the meaning of S. 93 (1) of the Madras District Municipalities Act, 1920 and was liable to pay profession-tax.

M. S. Ramachandra Rao for Appellant.

P. Chandra Reddy for Respondent.

K. S.

Horwill, J. S. A. No 1004 of 1936.

29th November, 1939.

Interest Act (XXXII of 1839), S. 1—Deposit held under contract to pay interest—Refusal to pay on demand—Wrongful retention of the money—Interest Act—If applicable.

Where money was originally held in deposit under a contract to pay interest at a certain rate, from date of refusal to pay the money it was no longer held as a deposit under the original contract but was held adversely. The fact that by the contract which had come to an end a lower rate of interest was payable does not prevent the application of Interest Act, S. 1 after the contract had ceased.

K. Kotayya for Appellants.

P. Satyanarayana Rao for Respondents.

K. S.

Horwill, J. S. A. No. 435 of 1935.

1st December, 1939.

Civil Procedure Code (V of 1908) O. 22, r. 12—Suit filed by an uncle on behalf of his nephew to get a decree of the Panchayat Court against his nephew set aside on the ground that he was minor—Minor actually major on date of decree as well as suit—Suit if can be allowed to be continued by the nephew.

A suit was filed by an uncle in the name of his nephew for the purpose of making it appear that the nephew was a minor on the date of a decree of

the Panchayat Court against the nephew and to have the decree set aside. It was found that the plaintiff was a major on the date of the decree as well as suit and the suit was dismissed by the District Munsif. The Subordinate Judge however on appeal held that even if the plaintiff was a major the District Munsif ought to have given the nephew an opportunity of continuing the suit in his own name. On second appeal held, if the plaintiff was a major when the suit was filed, then clearly no other person had a right to file the suit on his behalf and the suit had to be dismissed. O. 22, r. 12, Civil Procedure Code, does not contemplate the giving of an opportunity to a person who is not on record to continue the suit. That rule applies to a case where a suit has been filed by a minor who becomes a major during the course of the trial.

A. Viswanatha Aiyar and *A. Ramaswami Aiyar* for Appellants.

V. T. Rangaswami Aiyangar and *T. T. Vijayaraghavan* for Respondents.

K. S.

Horwill, J. S. A. No. 1015 of 1936.
4th December, 1939.

Insolvency—Sale of property by Official Receiver—If ordinary Civil Court has power or control over the acts of Official Receiver—Mere irregularity or inadequacy of price if ground for setting aside sale in a suit.

Where a suit is filed in the ordinary Civil Court for setting aside a sale of the insolvent's property by the Official Receiver a mere irregularity or inadequacy of price would be no ground for setting aside the sale. A sale can be set aside in a Civil Court only on grounds similar to those on which a contract could be set aside An ordinary Civil Court has no power or control over the acts of the Official Receiver.

P. Satyanarayana Rao and *S. Srinivasachari* for Appellants.

A. Lakshmayya and *S. Venugopala Rao* for Respondents.

K. S.

The Chief Justice and L. P. A. No. 75 of 1937.
Krishnaswami Aiyangar, J.
4th December, 1939.

Specific performance—Contract for sale of land—Vendee entering into possession—One of the vendors (member of a joint Hindu family) minor—Right of vendors to sue for specific performance.

Where the vendors were (three brothers forming a joint Hindu family) one of whom was a minor, and the vendee had entered into possession, a suit for specific performance at a time when the minor had attained majority is maintainable.

Hoggart v. *Scott*, 1 Russ & M. 293 and *Salisbury* v. *Hatcher*, 2 Y & C.C. C. 54, applied.

[Decision of *Venkataramana Rao, J.*, affirmed.]

P. Somasundaram for Appellant.

P. Satyanarayana Rao for Respondent.

K. S.

The Chief Justice and C. M. P. No. 5291 of 1939.
Krishnaswami Aiyangar, J.
6th December, 1939.

Civil Procedure Code (V of 1908), S. 109—Order on appeal deciding that a sale in execution of mortgage decree should be set aside—If a 'final order' within meaning of S. 109 on which an appeal can be preferred to His Majesty in Council.

The mortgagee decree-holders after obtaining leave to bid and set off, became the auction-purchasers in the execution. The mortgagor's application to have the sale set aside on the ground of material irregularity was dismissed. The High Court on appeal set aside the sale. The decree-holders application for leave to appeal to His Majesty in Council was opposed on the ground that the order on appeal did not constitute a final order within the meaning of S. 109, Civil Procedure Code.

Held, the order finally disposed of the question whether the sale should be set aside and the order is final within the meaning of S. 109, Civil Procedure Code, and the decree-holders are entitled to have leave to appeal to His Majesty in Council.

T. M. Krishnaswami Aiyar and *A. Balasubramania Aiyar* for Petitioners.

R. Gopalaswami Aiyangar for Respondent.

K. S.

Kunhi Raman, J. C. R. P. No. 673 of 1937.

7th December, 1939.

Civil Procedure Code (V of 1908), S. 115 and second schedule cl. 16—Award made into decree of Court under cl 16—No appeal filed against decree—Interference with award by way of revision—If competent.

When a final judgment has been pronounced on an award under Civil Procedure Code, Sch. II, cl. 16 and no appeal has been filed against such decree, it is not open to a petitioner to attack the validity of the award itself in a Civil Revision Petition.

A. C. Sampath Aiyangar for Petitioner.

T. V. Ramanatha Aiyar for Respondent.

K. S.

Mockett, J. C. R. P. No. 214 of 1938.

8th December, 1939.

Limitation Act (IX of 1908), S. 4—Madras Village Courts Act—Filing of suit for Rs. 20 in District Munsif's Court on reopening day, period of limitation having expired when Court was closed—Cognisability of suit by Village Court under Madras Village Courts Act—Effect—Civil Procedure Code, S. 15—Court of lowest grade competent to try—Village Court if such a Court.

In a suit for Rs 20 balance due under a pronote, the limitation for filing which had expired when the Court was closed,

Held: the period of limitation allowed by S. 4 of the Limitation Act cannot be cut down by any implication. Plaintiff is entitled to sue in District Munsif's Court and there is no compulsion to go to the Village Munsif's Court and a plaintiff was entitled to wait until the reopening of the District Munsif's Court, though the Village Munsif's Court was open. The "Court of lowest grade competent to try in S. 15, Civil Procedure Code, is the District Munsif's Court and not the Village Munsif's Court.

N. Bapiraju for Petitioner.

M. S. Ramachandra Rao for Respondent.

K. S.

The Chief Justice and Krishnaswami Aiyangar, J. O. S. A. No. 51 of 1939.
12th December, 1939.

Indian Succession Act (XXXIX of 1925), S. 241—Letters of administration with will annexed—If can be granted to agent of executor resident abroad without requiring security.

A probate of the will was obtained in England where the testator died. The executrix was not able to come to India to take out letters of administration and granted a power of attorney to the petitioner to apply as her agent. The practice, since the Succession Act of 1865, has been to grant letters of administration with a copy of the will annexed in cases such as this without requiring security to be furnished. *Somayya, J.*, considered that the practice was in conflict with the wording of S. 241 and refused to follow it and held that the appropriate section was S. 228 under which security would have to be furnished. On appeal having regard to the long practice and the scheme of this Act *held*, letters of administration should be issued under S. 241 without security.

C. Krishnaswami Aiyar instructed by *King and Partridge* for Appellants.

The Advocate-General (Sir A. Krishnaswami Aiyar) and *The Government Solicitor* for the Government.

K. Rajah Aiyar, amicus curiae.

K. S.

Krishnaswami Aiyangar, J. C. R. P. No. 2192 of 1939.
13th December, 1939.

Administration suit—Specific legatee—If can be put in possession of his legacy before the accounts are completely taken and final decree is passed.

Where necessary safeguards had been taken to avoid the possibility of prejudice to such rights as may ultimately be established by the final decree the Court can put the specific legatee in possession of the legacy before the accounts are completely taken and the final decree is passed.

I.L.R. 1 Pat. 667, followed.

T. V. Muthukrishna Aiyar and *K. G. Srinivasa Aiyar* for Petitioner.

A. C. Sampath Aiyangar for Respondent.

K. S.

Krishnaswami Aiyangar, J. C. R. P. Nos. 1420 and 1447 of 1937.
15th December, 1939.

Court-fees—Execution application converted into suit under Civil Procedure Code, S. 47—Liability in the converted suit to pay court-fee.

It was contended that there was no liability cast upon a plaintiff in a suit converted from an application under Civil Procedure Code, S. 47, to pay the court-fee due in respect of such suit.

Held; the question whether a court-fee or a further court-fee is to be collected from the plaintiff must depend upon the nature of the suit and the relevant provisions of the Court-fees Act. The court-fee is payable.

K. Umamaheswaram for Petitioners.

Respondents not represented.

K. S.

The Chief-Justice and Krishnaswami Aiyangar, J. C. M. P. No. 2270 of 1939.
15th December, 1939.

Madras Debt Conciliation Act (XI of 1936), S. 4 (1)—Application for conciliation by undischarged insolvent without the leave of the Insolvency Court—Jurisdiction of the Board.

Where the applicant under S. 4 (1) of the Madras Debt Conciliation Act, 1936 was an undischarged insolvent and did not obtain the permission of the Insolvency Court for filing the petition,

Held, an insolvency takes away the jurisdiction of the Debt Conciliation Board and the Board has no jurisdiction to accept the petition.

(1938) 2 M. L. J. 93, applied.

P. Chandra Reddy for Appellant.

The Government Pleader (B. Sitarama Rao) for Respondent.

K. S.

Burn, Offg. C. J. and Krishnaswami Aiyangar, J. L. P. A. No. 100 of 1938.
2nd January, 1940.

Civil Procedure Code (V of 1908), O. 34, r. 14—Mortgage to father—Promissory note executed in favour of undivided son for interest due thereon—Decree on the promissory note and execution against mortgaged properties—O. 34, r. 14, Civil Procedure Code, whether bar.

For interest due on a mortgage the mortgagor executed a promissory note in favour of the mortgagee's son who filed a suit thereon and obtained a decree. His execution application was resisted on the ground that (*a*) the son must be deemed to be a mortgagee and (*b*) the decree is in respect of a claim arising under the mortgage and hence the proper remedy of the decree-holder is as mentioned in O. 34, r. 14, Civil Procedure Code.

Held, That the amount due under the promissory dote, since decreed was not a claim arising under the mortgage within the meaning of O. 34, r. 14 Civil Procedure Code, and the decree-holder was entitled to proceed against the mortgaged properties.

Decision of *King, J.*, reported in (1939) 1 M.L.J. 680, affirmed.

R. Desikan for Appellant.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Respondent.

K. C.

Gentle, J. C. S. No. 1 of 1937.
8th January, 1940.

Madras Motor Vehicles Taxation Act (III of 1931), S. 2—Steam Roller—If a motor vehicles liable to taxation under Act.

In a suit by the Madras Corporation against the Government asking for a declaration that their steam rollers were not liable to taxation under the Madras Motor Vehicles Taxation Act,

Held, a heavy superstructure on wheels, such as a steam roller, was a vehicle and if it propelled itself by mechanical power, it was a motor vehicle. Whether the roller was used or kept by a private person, firm or company or by a local authority, there could be no difference as to its nature. It was liable to taxation under the Madras Motor Vehicles Taxation Act.

A. Suryanarayana for the Corporation.

The Advocate-General (Sir Alladi Krishnaswami Aiyar) and *R. Ramamurti* instructed by *The Government Solicitor* for the Government.

K. S.

Horwill, J. S. A. No. 691 of 1936.
27th November, 1939.

Appeal—Official Receiver of the estate of one of the plaintiffs not added as respondent—Maintainability of appeal.

The non-joinder of the Official Receiver of one of the plaintiffs as respondent in the appeal is fatal to the maintainability of the appeal where he is one of the holders of a joint decree.

52 M.L.J. 460 and 19 C.W.N. 290, relied on.

I.L.R. 57 All. 445 and A.I.R. 1928 All. 172, referred to.

The Advocate-General (Sir A. Krishnaswami Aiyar) and *M. S. Venkatarama Aiyar* for Appellants.

T. E. Ramabhadrachariar and *K. Rama Aiyangar* for Respondents.
K. S.

Horwill, J. S. A. No 1024 of 1936.
30th November, 1939.

Madras District Municipalities Act (V of 1920), S. 83—School buildings with lands round the building—Part of the land fenced off and rented to a shepherd—Lands how far exempt from assessment.

A school had a considerable area of land round it, a portion of which was fenced off and rented to a shepherd. The Municipal Council sought to assess the land claiming that only the building was exempt.

Held. if the building is exempt, the other parts of that unit, the sites and the adjacent premises occupied as an appurtenance would be exempt also. The portion rented out to the shepherd was not an appurtenance under S. 82 (1) and is not exempt from assessment.

V. Govindarajachari for Appellant.

Ch. Raghava Rao for Respondent.
K. S.

Horwill, J. S.A. No. 1052 of 1936.
1st December, 1939.

Madras Revenue Recovery Act (II of 1864), S. 58—Dispute as to area of land and assessment—Civil Court if can consider the question.

Where revenue authorities wrongly estimated the assessment and objection was raised that the area of the land had been wrongly estimated and the revenue authorities therefore arrived at a wrong figure in regard to the assessment,

Held, even if S. 58 of the Revenue Recovery Act does not operate as a bar to the granting of a declaration as to the area it will be clearly improper for a Civil Court to exercise its discretion and give a declaration which will have the effect of circumventing the provisions of S. 58 of the Revenue Recovery Act.

D. Narasaraju and *P. S. Sarma* for Appellant.

The Government Pleader (B. Sitarama Rao) for Respondent.
K. S

Pandrang Row and Abdur Rahman, JJ. L. P. A. Nos. 68 and 69 of 1938.
5th December, 1939.

Arbitration and Award—Minor not properly represented in arbitration proceedings—Protection of minor's interests by declaration that proceedings not binding on minor—How to be given effect to.

N R C

Where for any reason a portion of the award cannot be upheld and where it is separable, a decree in terms of the rest of the award can be made. Where the guardian *ad litem* in the proceedings was incompetent to fill the capacity of next friend or guardian *ad litem* because of adverse interest to the minor, the minor should be treated as if she was not a party to the proceedings at all and she can have liberty to take steps to either affirm or set aside the award after attaining majority. As the portion of the award relating to the minor was separable, such an order could be made The award is binding on the other parties.

I.L.R. 33 All. 326 (P.C.) and I.L.R. 53 Cal. 258, applied.

The Advocate-General (Sir A. Krishnaswami Aiyar) and *P. Govinda Menon* and *B. K. B. Naidu* for Appellant.

B. Lakkappa Rai and *K. R. Subramania Aiyar* for Respondent.

K. S.

The Chief Justice and
Krishnaswami Aiyangar, J.
6th December, 1939.

C. R. P. No. 354 of 1938

Civil Procedure Code (V of 1908), S. 73—Money decree against grandfather, his son and son's son in favour of A*—Previous decree against grandfather and son but not against grandson in favour of* B*—Adjudication of grandfather and son as insolvents—Execution, attachment and sale of grandson's interest by* A*—Right of* B *to rateable distribution—If decrees in favour of* A *and* B*, against same judgment-debtors.*

A obtained a money decree against a grandfather, his son and son's son and *B* had previously obtained a decree against the grandfather and the son but not against the grandson. On the adjudication of the grandfather and son, *A* attached and sold the grandson's share in execution and *B* put in an application claiming rateable distribution

Held, where a father who is joint with his son becomes insolvent, the right of realising the son's share in the family estate under the pious obligation rule devolves upon the Official Assignee or Official Receiver as the case may be. But if before the Official Assignee or Official Receiver takes steps to enforce that right, a judgment creditor of the father attaches the son's interest in the estate, the power of the Official Assignee or Official Receiver to sell the son's share is lost, and as the result of the attachment and sale of the grandson's share by *A*, the share becomes available to the executing creditor and all persons who became entitled to rateable distribution under S. 73 of the Civil Procedure Code.

Where a money decree is passed against a grandfather who is joint with his son and grandson it must be taken to be a decree passed against the son and grandson to the extent of their interests in the family property, as they are liable to that extent for his lawful debts. The two decrees are against the same debtor within the meaning of S. 73, Civil Procedure Code and *B* is entitled to have rateable distribution.

Case-law discussed.

Arunachalam Chettiar v. *Kalayappa Chettiar*, (1937) 1 M.L.J. 180, overruled.

K. V. Ramachandra Aiyar for Petitioner.

Respondent not represented.

K. S.

Burn and Mockett, JJ. C. C. C. App. No. 65 of 1938.
7th December, 1939.

Principal and surety—Composition by principal debtor—If implied discharge of surety—Express contract by surety to be liable notwithstanding composition—Effect—Banker—If bound to disclose state of account of a constituent to his surety—Contract Act, S. 143—If applicable.

A surety bond provided that any contract between the borrower and lender by which the lender makes a composition with or promises to give time or not to sue the borrower will not discharge the surety or sureties. In a suit against the sureties after the principal debtor had entered into a composition with the lender,

Held as the surety had expressly contracted to remain liable notwithstanding the discharge of the principal, it cannot now be contended that the discharge of the principal is an implied discharge of the surety.

Cowper v. *Smith,* 4 M. & W. 519: 50 E.R. 1534 and *The Union Bank of Manchester* v. *Beach,* 3 H. & C. 672: 159 E.R. 685, followed

There is no general legal obligation on the part of a bank to volunteer to a surety particulars of one of its constitutent's indebtedness for this is a matter on which the surety has to inform himself.

Imperial Bank of India v. *Avanashi Chettiar,* I.L.R. 53 Mad. 826, followed.

S. 143 of the Contract Act is not applicable to the case as mere non-disclosure as distinguished from intentional concealment cannot amount to 'keeping silence' under S. 143.

S. Athmanathan for Appellants.

John and Row for Respondents.

K. S.

Abdur Rahman, J. C. R. P. No. 1328 of 1936.
8th December, 1939.

Contract Act (IX of 1872), S. 72—Taxes and license fees paid under mistaken belief that properties and business were situated within jurisdiction of the Panchayat Board—Claim for refund—Sustainability.

A person who pays taxes and license fees under the mistaken belief that the properties and business were situated within the jurisdiction of the Panchayat Board, does so under a mistake of fact and is entitled to recover them as money had and received under S. 72 of the Contract Act.

K. V. Gopalaswami and *G. Balaparameswari Rao* for Petitioner.

Kasturi Seshagiri Rao for Respondent.

K. S.

Kunhi Raman, J. C. M. S. A. No. 31 of 1938.
12th December, 1939.

Transfer of Property Act (IV of 1882, as amended by Act of 1929), S. 67-A—If retrospective and applicable to rights and remedies acquired prior to amendment.

The provisions of S. 67-A—(that in the absence of a contract to the contrary a mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has a right to obtain the same kind of decree under S. 67 shall be bound to sue on all the mortgages in respect of which the mortgage money has become due) are not retrospective.

P. Sivaramakrishniah for Appellant.

V. Govindarajachari for Respondent.

K. S.

The Chief Justice and Krishnaswami Aiyangar, J. L. P. A. Nos. 97 and 98 of 1938.
12th December, 1939.

Suit on pronote executed by Hindu father—Sons who were made parties dismissed from suit—Sons if exonerated from liability under Hindu Law in respect of the decree.

In a suit on a promissory note executed by the father alone the sons were made parties and in the first appellate Court a decree was passed against the father alone and the sons were dismissed from the suit. In execution proceedings the decree-holder asked for the attachment and sale of the sons' interests in the family property. The sons objected on the ground that as they had been dismissed from the suit they could not be held liable for their father's debts.

Held, after examining the case law, the dismissal of the suit as against the sons did not prevent the decree-holder executing the decree against the sons' interests in the family property.

I.L.R. 27 Mad. 243 (F.B.), followed.

I.L.R. 13 Luck. 61 (P.C.), distinguished.

Decision of *King, J.*, reversed.

V. Govindarajachari for Appellants.

Y. Suryanarayana for Respondents.

K. S.

Horwill, J. S. A. No. 801 of 1938.
15th December, 1939.

Court-Fees Act (VII of 1870), Ss. 10 (2) and 12—Order on plaintiff-respondent to pay deficit court-fee which ought to have been paid in the Court below—Default—Applicability of Ss. 12 and 10 (2).

In an appeal the respondent who was the plaintiff was directed to pay the deficit court-fees on the plaint and in default the suit was directed to be dismissed under S. 10 (2). It was contended that the provisions of S. 12 (2) applied only to cases where the plaintiff is the appellant.

Held (dissenting from the Allahabad decisions), that in applying S. 10 (2) to appeals and reading it with S. 12 (2) the word "suit" should be deemed to include "appeal". Moreover the actual wording of S. 12 (2) shows that the appeal is considered as an extension of the suit.

V. Govindarajachari and *V. V. Raghavan* for Appellant.

A. Viswanatha Aiyar for Respondent.

K. S.

Krishnaswami Aiyangar, J. C. R. P. No. 2264 of 1939.
15th December, 1939.

Indian Registration Act (XVI of 1908), S. 17 (2) (i)—Composition deed with trustees—If exempted from registration—Admissibility in evidence when unregistered.

In a composition deed two creditors were appointed trustees and through them all assets were to be realised and distributed among creditors. In a

suit by the trustees it was contended that the deed was inadmissible in evidence for want of registration.

Held (following the Bombay view in preference to the Allahabad view), the mere fact that a certain kind of trust enters into its constitution and character is not sufficient to take the deed out of the category of a composition deed within the meaning of S. 17 (2) (i) of the Indian Registration Act. Such a deed is not inadmissible in evidence for want of registration.

C. K. Viswanatha Aiyar for Petitioner.

N. R. Sesha Aiyar for Respondent.

K. S.

Burn, O. C. J., and Krishnaswami Aiyangar, J. S. R. No. 27956 of 1939.

4th January, 1940.

Presidency Towns Insolvency Act (III of 1909), S. 106 (1) (a)*—Order for administration of an insolvent estate in a summary manner—Failure to obtain leave of Court to appeal—Appeal if can be entertained.*

Under S. 106 (1) (*a*) of the Presidency Towns Insolvency Act it is quite clear that where an insolvent's estate has been ordered to be administered in a summary manner, no appeal lies from any order of the Court except by leave of Court, and so where no leave is obtained the appeal cannot be entertained.

T. P. Ramachandra Aiyar for Appellant.

K. S.

Lakshmana Rao, J. Cr. R. C. No. 955 of 1939

10th January, 1940.

Criminal Procedure Code (V of 1898), S. 110—Security proceedings under—Scope of enquiry—If limited to the acts committed within the limits of jurisdiction of the Magistrate who heard the case.

Where the jurisdiction of the Magistrate to institute proceedings under S. 110, Criminal Procedure Code, in respect of acts (in connection with labour strikes, etc.) committed within the local limits of his jurisdiction was not disputed, the section in respect of the offence did not restrict enquiry to acts committed within such local limits. Further, S.117, Cl. (4), Criminal Procedure Code, permitted proof of requisite facts under S. 110 by evidence of general repute or otherwise and the enquiry cannot be restricted to acts committed within the local limits of jurisdiction of the Magistrate who heard the case.

A. K. Pillai for Petitioner.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

Stodart, J. S. A. No. 1081 of 1936.

15th January, 1940.

Contract Act (IX of 1872), S. 153 and Civil Procedure Code (V of 1908), O. 20, r. 10 and O. 21, r. 31—Pawn—Repudiation by pawnee of pawnor's title—Cessation of right to interest.

The plaintiff borrowed Rs. 800 from defendant on a pledge of jewels, and when she offered to redeem, the defendant denied the contract with the plaintiff and repudiated her title and subsequently sold them away. In the

suit filed by plaintiff for redemption, the District Munsiff found as a fact that the plaintiff was the owner and had pledged with defendant,

Held, that under S 153 of the Indian Contract Act, repudiation of plaintiff's title terminated the contract and interest ceased to run for the amount lent from the date of the repudiation. The plaintiff was not bound to deposit even the principal amount in the first instance and defendant was bound to deposit the jewels in Court. A decree under O. 21, r. 31, Civil Procedure Code, was passed.

K. Someswara Rao for *Kasturi Seshagiri Rao* for Appellant.

Respondent not represented.

K. S.

Lakshmana Rao, J. Crl. App. No. 601 of 1939.
16th January, 1940.

Madras City Police Act (III of 1888), S. 60 and S. 71 (9)—Seizure of cows found straying on the road under S. 60 and proscution of owner under S. 71, cl. 9—Presence of owner at the time of seizure if necessary to constitute the offence—Redemption of the cattle by payment of pound fee—If an answer to the charge and ground for acquittal.

To bring a case under S. 71, cl (9) of the Madras City Police Act, it is not necessary that the owner of the cattle should be present at the time of the seizure of the cattle. The redemption of the cattle by payment of the pound fee is no answer to the charge under cl. 9 of S. 71 of the Madras City Police Act and an acquittal on these grounds in unsustainable.

C. D. Venkataraman for the Crown Prosecutor for the Crown (Appellants).

Respondent not represented.

K. S.

King J. C. M. S. A. No. 94 of 1938
16th January, 1940.

Limitation Act (IX of 1908), Art. 182 (5)—Execution petition by assignee of mortgage decree under unregistered deed—If in accordance with law, to save limitation

A person who claimed to be the assignee of the mortgage decree under an unregistered assignment deed applied for execution in 1934. The said application was dismissed for non-payment of batta.

He again applied in 1936 for execution after obtaining a fresh assignment deed duly registered and claimed that his application of 1934 saved limitation as an application in accordance with law.

Held, that the application of 1936 was rightly dismissed as barred by time as the unregistered document conferred no rights on the applicant and his mere assertion as transferee under O. 21. R. 16 would not give him a right to apply in 1934.

I.L.R. 37 Bom. 42; 6 M.L.J. 31; 47 Mad. 641, Distinguished.

S. Jagadisa Aiyar, for Appellant.

T. E. Ramabhadrachariar, for Respondent.

K. S.

The Chief Justice and Krishnaswami Aiyangar, J. S. A. No. 595 of 1936.
27th November, 1939.

Hindu Law—Inheritance—Brother's son's daughter—If entitled to inherit.

A brother's son's daughter is only four degrees removed from the common ancestor being less than seven degrees in ascent and descent from the last male owner and the test of mutuality also is satisfied. Female bandhus are not disqualified by reason of their sex only.

8 M.H.C.R. 88, relied on.

She is entitled to rank as heir under Hindu Law.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Appellant.

B. Jagannadha Das for Respondent.

K. S.

Stodart, J. S. A. No. 692 of 1936.
4th December, 1939.

Deposit of pronote as security—If transfer of pronote.

The deposit as security of a promissory note creates a pledge of the promissory note and the transfer is sufficiently effected by the recitals in the document of pledge.

I.L.R. 38 Mad. 297, followed.

V. S. Narasimhachar for Appellant.

A. Gopalacharlu for Respondent.

K. S.

Burn, Offg. C. J. and Krishnaswami Aiyangar, J. L. P. A. No. 13 of 1939.
2nd January, 1940.

Madras Court of Wards Act (I of 1902), S. 49—Notice as condition precedent to institution of suit against Court of Wards—Proper form.

A notice to the Court of Wards who were in management of an estate was issued on behalf of the deities and it was contended that the notice was invalid as it did not contain a proper description of the intending plaintiff. In the notice in question the names of the temples were mentioned as also the village in which they are situate.

Held, it is sufficient compliance with S. 49 even on a strict construction. Although the names of the managers are mentioned as the plaintiffs and although they have been described in the plaint as trustees, in the eye of law, they are merely the managers, the deities themselves being the true plaintiffs in fact.

S. V. Venugopalachari for Appellant.

M. E. Rajagopalachari for Respondent.

K. S.

Pandrang Row and Horwill, JJ. A. A. O. Nos. 303 and 304 of 1938.
4th January, 1940.

Civil Procedure Code (V of 1908), O. 21, r. 90—"Person whose interests are affected by the sale"—Sale of property of person since adjudged insolvent —Insolvent if person affected by sale.

The words "whose interests are affected by the sale must be construed in their ordinary sense and it is too much to say that merely because a person is

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adjudicated insolvent his interests are not adversely affected by the sale of property that belonged to him before adjudication.

Case-law reviewed.

65 M.L.J. 719 (F.B.), followed.

Such a person is entitled to present an application to set aside the sale.

S. Thiagaraja Aiyar for Appellant.

V. C. Viraraghavachari for Respondent.

K. S.

Horwill, J. S. A. No. 1027 of 1936.

5th January, 1940.

Malabar Law—Trespasser—If entitled to retain possession of the land trespassed on until the true owner pays for improvements effected.

It is of course true that Malabar law permits a person to claim compensation for improvements effected by him when he was in possession of the land *bona fide* believing that he was entitled to it. But if a person deliberately enters upon another's land and thereby excludes possession by the true owner, it is unreasonable that he should be entitled to any compensation for improvements.

I.L.R. 38 Mad. 710, explained and not followed.

K. Kuttikrishna Menon for Appellant.

O. T. G. Nambiar for Respondent.

K. S.

King, J. A. A. O. No. 337 of 1938.

8th January, 1940.

Civil Procedure Code (V of 1908), O. 7, r. 10 and O. 41, r. 33 and S. 107—Suit over-valued and filed in Court of higher pecuniary jurisdiction—Powers of appellate Court to return plaint for presentation to proper Court—Suits Valuation Act, S. 11—Appellate Court's power to take cognisance of objection to jurisdiction of trial Courts.

The appellate Court has power to pass any order which the Court of first instance ought to have passed The appellate Court's powers are not restricted by the mere fact that it is one party rather than another which has originally invoked its jurisdiction by filing the appeal. Even in a plaintiff's appeal, the appellate Court can return the plaint to be presented to the proper Court.

S. 11 of Suits Valuation Act permits the appellate Court to take cognizance of an objection to the jurisdiction of the lower Court in certain circumstances, *viz.*, (1) that an objection had already been taken in the Court of first instance, and (2) the appellate Court is satisfied that the suit or appeal was over-valued or under-valued, and (3) that the over-valuation or under-valuation has prejudicially affected the disposal of the suit or appeal on its merits.

D. Narasaraju for Appellant

K. Kameswara Rao for Respondent.

K. S.

Abdur Rahman, J. C. R. P. No. 1216 of 1938.

11th January, 1940

Practice—Framing issues—Issues proposed by parties—Recording as matter of course—Propriety—Duty of Court.

There is absolutely no warrant for the procedure which appears to be prevailing in this Presidency that the issues are proposed by the parties and recorded invariably as a matter of course. It is the duty of Courts to frame issues after reading the pleadings and after such examination of the parties as may appear necessary. [*Vide* O. 14, r. 1 (5), Civil Procedure Code]. Not to say of the examination of the parties before the issues are framed—a thing which although common in other provinces is wholly unknown in this—the Courts do not think it as part of their duties to read the plaints and written statements in which issues are to be framed. This is entirely wrong and the sooner the practice of the issues being proposed by the parties is abandoned, the better for all concerned. It is the duty of the Courts to go through the pleadings themselves and then frame issues. They should also as far as possible, examine the parties before the issues are struck and particularly when they find the pleas to be vague or indefinite.

K. Bhimasankaram for Petitioners.

Respondents not represented.

K. S.

King, J. A. A. O. No. 485 of 1938.
12th January, 1940.

Partnership suit—Final decree overlooking need for decision on question of liability of partners inter se*—Suit if can be deemed to be pending and defective decree if can be amended under S. 151 or 152, Civil Procedure Code—Proper remedy.*

At the time when the final decree was passed in a suit for dissolution of partnership the Court overlooked entirely the need for a decision, though an issue had been framed, on the question of the liability of the defendants *inter se*. In an application for amendment of the decree under S. 151 or 152,

Held, Ss. 151 and 152 do not apply to the case. When a defective decree has been passed, even though it fails to provide a final adjudication on points at issue between the parties the suit cannot be held to be pending and no remedy can be granted to any of the parties on the assumption that the suit is still pending. The only remedy is by way of an application for review.

K. Y. Adiga and *K. P. Adiga* for Appellant.

A. Narayana Pai for Respondent.

K. S.

Lakshmana Rao, J. C. R. P. No. 432 of 1938.
12th January, 1940.

Civil Procedure Code (V of 1908), Ss. 63 and 73—The two sections should be read together—Right to rateable distribution.

The assets were received after attachment of the property and Ss. 63 and 73 of the Code of Civil Procedure have to be read together and the person attaching would be entitled to rateable distribution.

1935 M.W.N. 1046 and I.L.R. 59 Mad. 1028, followed.

K. V. Ramachandra Aiyar for Petitioner.

Respondent not represented.

K. S.

Burn, Offg. C. J. and Krishnaswami Aiyangar, J. Appeal No. 100 of 1937.
16th January, 1940.

Limitation Act (IX of 1908), Art. 23—Suit for damages for malicious prosecution—Starting point of limitation.

In a suit for damages for malicious prosecution the proper point of time for starting of limitation of one year is the date of disposal of the revision petition discharging the plaintiff and not from the date of the order of discharge by the Sub-Divisional Magistrate.

(1938) 1 M.L.J. 344=I.L.R. 1938 Mad. 675 (F.B.), followed.

D. Suryaprakasa Rao for Appellant.

V. Suryanarayana for Respondent.

K. S.

Wadsworth and Patanjali Sastri, JJ. A. S. No 269 of 1936.
17th January, 1940.

Practice—Joinder of causes of action—Suit by executors for partition of properties left under the will—Prayer for partition of other joint family property—Joinder if proper—Incompetency on account of adverse interest of next friend of minor—If involves dismissal of suit.

One *G* died leaving a will by which he directed two executore *M. V.* and another to partition his half-share of the estate and deliver it to his sons' sons and directed his son to be the managing executor under the direction of the other two executors. *M. V.* sued for partition and possession on behalf of all the executors making all of them parties. He also joined in that suit a prayer for partition and possession of the joint family properties, *viz.*, the other half on behalf of the minor grandson then living.

Held, that the joinder of the two causes of action was improper and plaintiff should be put to his election.

Held also, that the incompetency of the next friend on the ground of adverse interest will not involve the dismissal of the suit.

1 L.W. 875, distinguished.

Held also, that the fact that the co-executors were not consulted especially having regard to their attitude will not involve the dismissal of the suit which was to enforce a duty cast by the will itself on them.

I.L.R. 26 Mad. 461 and I.L.R. 34 Mad. 406, referred to and considered.

S. T. Srinivasagopalachariar for Appellant.

K. Rajah Aiyar and *T. E. Ramabhadrachariar* for Respondents.

K. S.

Pandrang Row and Horwill, JJ. Reference No. 8 of 1939.
18th January, 1940.

Criminal Law—Procedure—Prosecution formally admitting that case against accused not established—Judge also summing up for acquittal—Unanimous verdict of "guilty" by jury—Verdict to be set aside as perverse.

The accused was charged with the theft in the alternative of receipt or detention of stolen property namely, a bull knowing it to be stolen. After the evidence the prosecution in the address told the jury that the case had not been established and invited the jury to return the verdict of "not guilty." The Judge also summed up for acquittal. But the jury returned the unanimous verdict of guilty.

Held, the facts show that the jury must have acted in a perverse manner and the verdict cannot be said to be a reasonable one. The verdict must be set aside and the accused acquitted.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

Patanjali Sastri, J. C. R. P. No. 1636 of 1938.
19th January, 1940.

Madras Agriculturists Relief Act (IV of 1938)—Mortgage decree debt due by Hindu joint family—Application for scaling down by one member—Relief under Act if restricted to his share—Relief if restricted only to agricultural land included in mortgage.

Where one member of a joint Hindu family sought to have a debt due by the joint family scaled down,

Held, any member of a joint family can apply to have the decree debt of the family scaled down and it is the debt of the family as a whole that is to be scaled down, if the family is proved to be an agriculturist within the meaning of Act IV of 1938. The benefit under the Act is not to be restricted to the member of the family who makes the application. The entire scheme of the act has reference to the character of the debtor and not to the character of the property comprised in a security for the debt. So where there is a mortgage comprising of agricultural land and other properties, the scaling down cannot be restricted only to agricultural land comprised in the mortgage.

A. C. Sampath Ayyangar and *S. Krishnamachariar* for Petitioner.

T. S. Anantaraman for Respondent.

K. S.

Gentle, J. O. M. S. No. 8 of 1939.
23rd January, 1940.

Divorce—Pregnancy of wife—Evidence by husband as to non-access—Rule in Russel *v.* Russel*—If applicable—European British Subject abandoning intention of returning to England—Domicile of residence—Indian Divorce Act applicable.*

The rule in *Russel* v. *Russel* does not apply to petitions filed under the Indian Divorce Act—1931 M.W.N. 1278 purely based on provisions of Evidence Act followed.

Where the petitioner the husband gives up the intention of returning to his place of birth the domicile of origin is abandoned and the domicile of residence is acquired. The Indian Divorce Act, 1869, will apply to the case and the decision in *Russel* v. *Russel* does not apply.

Antony Lobo and *A. Viswanathan* for Petitioner.

Respondents not represented.

K. S.

The Chief Justice and Krishnaswami Aiyangar, J. Crl. M. P. No. 1361 of 1939
23rd January, 1940.

Contempt—Newspaper publishing article commenting on legal proceedings during their pendency—False defence of want of knowledge of pendency of proceedings—Gross contempt.

When comments are published with full knowledge that legal proceedings were pending, it amounts to gross contempt of Court. The person in contempt published no statement by way of apology and put forward a false defence that he was not aware of the pendency of the proceedings.

Held, the Court cannot allow comments to be made on cases pending before it or before the Subordinate Courts of the province and convicted the first respondent to simple imprisonment for one month.

P. Somasundaram and *G. Balaparameswari Rao* for Petitioner.

V. Viyanna for 1st Respondent.

N. Bapiraju for 2nd Respondent.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) for the Crown.

K. S.

Lakshmana Rao, J. Crl. R.C. No. 22 of 1940 and
25th January, 1940. Crl. R. P. No. 19 of 1940.

Criminal Procedure Code (V of 1898), Ss. 130 and 133 (1)—Order on respondent to remove a deity and chapram *left in a public street—Jury finding that* chapram *should be allowed to be taken in procession—Order to take* chapram *and deity without paraphernalia of a regular procession—Sustainability.*

The Sub-Divisional Magistrate passed a conditional order under S. 133 (1) of Criminal Procedure Code, directing the respondent to remove a deity and *chapram* left in a public street and the order was made absolute as the respondent refused to receive the notice and failed to appear. The respondent then applied for the appointment of a jury denying the alleged refusal of notice by him and a jury was appointed. The jury found that the *chapram* should be allowed to be taken in procession through a particular street, but their view was not accepted by the Sub-Divisional Magistrate. Further proceedings under Chapter X had therefore to be dropped as required by S. 130 (2), Criminal Procedure Code. But the Sub-Divisional Magistrate ordered that the *chapram* and deity should be allowed to be taken along the particular street without the paraphernalia of a regular procession with the required number of persons to drag the *chapram.*

Held, the order was unsustainable and must be set aside leaving the local authorities to take appropriate steps for removal of the obstruction.

K. S. Jayaram Aiyar for *G. Gopalaswami* and *E. S. Subramaniam* for Petitioner.

D. Israel for Respondent.

The Public Prosecuor (*V. L. Ethiraj*) for the Crown.

K. S.

Wadsworth and Patanjali Sastri, JJ. C. R. P. No. 1112 of 1939.
30th January, 1940.

Madras Agriculturists Relief Act (IV of 1938), S. 4 (h)—"*Debt or Debts" meaning—Exemption of women creditors—If affected by existence of other property or other debts due by non-agriculturists.*

The section is not happily worded. Construing the language actually used and considering the intention of the framers of the Act the word "debt or debts", in S. 4 must be regarded as a whole provided of course the debt or debts were owed by agriculturists. Any debt owed by non-agriculturists to the woman plaintiff or any other property not in the shape of debt cannot be included, as it would deprive the woman of the benefit of the exemption.

K. Narasimha Ayyangar and *D. Ramaswami Ayyangar* for Petitioner.

T. M. Krishnaswami Ayyar and *A. Balasubramania Ayyar* for Respondent.

K .S.

Venkataramana Rao, J. S. A. No. 22 of 1937.
11th January, 1940.

Indian Contract Act (IX of 1872), S. 43—Division of outstandings and liabilities between three partners and covenant to indemnify the other partners for loss due to default or delay—If excludes right to contribution under S. 43 of Contract Act.

Where partners divided outstandings and liabilities into three shares and each partner is made responsible for one-third share of every liability and on default there was covenant for indemnity for loss due to default or delay by any partner.

Held, the clause clearly excludes the right of contribution which will be available under S 43 of the Indian Contract Act against the partners equally.

B. Sitarama Rao for Appellant.

K. S. Sankara Aiyar and *S. Ramaswami Aiyar* for Respondents.

K. S.

Venkataramana Rao, J. S. A. No. 980 of 1934.
12th January, 1940.

Negotiable Instruments Act (XXVI of 1881), S. 70—City or village indicated as place for payment—"Presentment" how to be made—"Residence"—Meaning.

Where in a bill or note a city or a village is indicated as the place of payment without mentioning a particular place therein, it would be a valid presentment if the note is presented in the city or village at the place of business of the drawer or the maker or at his dwelling or to him personally at any place therein.

A.I.R. 1937 Lah. 259 at 263, applied.

"Residence" is a word of wide connotation and may mean a city, town or village or a particular place therein.

V. Subramaniam and *V. Satyanarayana* for Appellant.

V. Rangachari for Respondent.

K. S.

Horwill, J. S. A. No. 809 of 1936.
12th January, 1940.

Trust—Scheme prohibiting borrowing from or lending to trust fund—Person lending contrary to the provision—Rights.

Where a clause in a scheme prohibited borrowing from or lending to the trust fund on interest and plaintiff under power of attorney from trustees managed the trust and incurred expenses for provisions and necessaries, in a claim for the amount,

Held, the plaintiff cannot be heard to say that he was enabling the trustee to perform his duty to the trust and therefore entitled to be compensated for what he has supplied.

S 65 of the Contract Act does not apply as the plaintiff deliberately incurred the expenses in express contravention of the restriction in the scheme. The trustee's promise to pay and pronotes by him on behalf of the trust cannot bind the trust either. As the pronote was not by the trustee for himself a decree against the trustee cannot be granted; with a proper plea and evidence of *quantum meruit* the plaintiff might get such amount.

K. Rajah Aiyar and *R. Sundaralingam* for Appellant.

B S. Ramachandra Rao and *K. Kameswara Rao* for Respondents.

K. S.

N R C

Wadsworth and Patanjali Sastri, JJ. Appeal No. 17 of 1937.
15th January, 1940.

Hindu Law—Joint family business—Liability of coparcener taking part in business—Nature and extent—Test.

The whole question, whether a coparcener who takes part in the conduct of the family business is personally liable and if so on what legal basis, is essentially one of fact depending for its decision upon the nature and extent of participation as disclosed by the evidence in the particular case. If what the junior member is shown to have done in relation to the business is nothing more than what can reasonably be attributed to his interest in the business as a member of the family, there will be no legitimate inference that he intended to undertake a greater liability as a partner in the business. If the part taken by such member in the management of the business goes beyond what can be sufficiently explained by his interest in it as an asset of the family, as for instance when he joins in borrowing for the purposes of the business, it may afford ground for the conclusion that he has become a partner so as to be personally answerable for all debts incurred in the course of the business including those which he did not join in borrowing. No partnership relation can be implied (from participation, however active in the conduct of the family business) in the absence of definite and unequivocal consensual acts on the part of the coparcener.

Case-law examined.

K. S. Sankara Aiyar for Appellant.

N. G. Krishna Aiyangar for Respondent.

K. S.

Burn, Offg. C. J. and Krishnaswami Aiyangar, J. App. No. 67 of 1937 and C. R. P. No. 297 of 1937.
16th January, 1940.

Civil Procedure Code (V of 1908), Sch. II, Paragraph 16 (1)—Arbitration and award—Court's jurisdiction to pronounce judgment before expiry of ten days (provided for submission of application to set aside award under Art. 158 Limitation Act)—Consent of parties—Effect.

Sub-para. (1) of para. 16 of Sch. II, Civil Procedure Code, cannot be read as implying that (even where parties consent to immediate pronouncement of judgment) the Court has no jurisdiction to pronounce judgment until after expiry of ten days after receipt of the award. The rule lays upon the Court the duty of pronouncing judgment after the expiry of ten days prescribed by Limitation Act, Art 158, but it does not say that the Court has no jurisdiction to pronounce judgment earlier.

1912 M.W.N. 1232 and 67 M.L.J. 377 distinguished as cases where there was no consent of parties.

S. Venkatesa Aiyangar for Appellant in App. No. 67 of 1937 and Petitioner in C.R.P. No. 297 of 1937.

P. C. Parthasarathy Aiyangar for Respondent in App. No. 67 of 1937.
Respondent not represented in C.R.P. No. 297 of 1937.

K. S.

Patanjali Sastri, J. C. R. P. No. 1570 of 1938.
19th January, 1940.

Provincial Small Cause Courts Act (IX of 1887), S. 25—Court deciding only that it has jurisdiction to proceed with the suit—Revision if lies at that stage.

Where in a small cause suit the Court below only held that it had jurisdiction to proceed with the suit and posted it for trial on the merits and a revision petition was preferred against the order,

Held, unlike under S. 115 of the Civil Procedure Code, S. 25 of the Provincial Small Cause Courts Act allows a revision for the purpose of this Court satisfying itself that a decree or order made in any case decided, was according to law. It is difficult to say that there is a decree or order and revision cannot lie at that stage.

I.L.R. 58 Mad. 771 is a case under S. 115, Civil Procedure Code, and is not applicable to cases under S. 25, Provincial Small Cause Courts Act.

E. R. Krishnan for Petitioner.

S. Annamalai for Respondent.

K. S.

Abdur Rahman, J. C. R. P. No. 481 of 1939.
19th January, 1940.

Madras Agriculturists Relief Act (IV of 1938), S. 15 and r. 6 (1)—Amount claimed by major inamdar against minor inamdar for water charges, land cess, etc., alleged to have been paid to Government by former—If "rent".

The relationship between major and minor inamdars is not that of landlord and tenant and S. 15 and r. 6 (1) of Act IV of 1938 would have no application.

K. Rajah Aiyar and *T. A. Ramaswami Reddiar* for Petitioner.

K. Rajasekharan for Respondent.

K. S.

Horwill, J. C. R. P. No. 490 of 1939.
19th January, 1940.

Madras Agriculturists Relief Act (IV of 1938), S. 20—Duty of Court to grant stay of execution.

The Court is bound if it is satisfied that the person making the application is entitled to the benefit of the Act, to stay the proceedings in order to give the judgment-debtor an opportunity to have the decree modified by the Court which passed the decree. If an application is not put in within 60 days or if an application under S. 19 is dismissed, the Court can proceed with the execution proceedings.

V. C. Viraraghavachari for Petitioner.

A. C. Sampath Ayyangar and *S. Krishnamachari* for Respondent,

K. S.

King, J. S. A. No. 1221 of 1936.
23rd January, 1940.

Specific Relief Act (I of 1877), S. 42—Melvaramdar—Dispossession by prevention from collecting rents—Suit only for declaration and injunction without claiming possession—If "omissions to seek further relief"—Mandatory injunction sufficient to give all the relief—Effect.

A village blacksmith's right to receive the melvaram for service inam was refused. In a suit for declaration and injunction,

Held, the right of a landlord to receive rent is clearly capable of possession and therefore of dispossession and refusal to pay the rent amounts to a dispossession which is final and complete, though right to collect such rent can be exercised only once a year. A suit for declaration and injunction

without claiming possession offends Specific Relief Act, S. 42. But by claiming the mandatory injunction which gives the only possession of which plaintiff's right is capable, the plaintiff has not in the language of S. 42, Specific Relief Act, "omitted to seek for further relief".

K. V. Sesha Aiyangar for Appellant.

K. V. Srinivasa Aiyar for Respondent.

K. S.

King, J. A. A. A. O. No. 115 of 1938.
24th January, 1940.

Right of performing pooja *in a temple for one month in every year—If alienable and if can be sold in the insolvency of the* poojari.

The right of performing *pooja* in a temple for one month in every year is a religious office and is inalienable; on the insolvency of the holder of the right the right cannot be sold by the Official Referee.

I.L.R. 15 Mad. 183, applied.

V. P. Chakravarthi for Appellant.

S. Sitarama Aiyar and *S. Rajaram* for Respondent.

K. S.

The Chief Justice and O. S. A. No. 64 of 1938.
Krishnaswami Aiyangar, J.
24th January, 1940.

Madras High Court Original Side Rules, O. 23—Official Referee—Powers—English practice—How far applicable.

Questions as to substantive rights are solely within the province of a Judge and matters of detail that is, the working out of those rights either by taking accounts or effecting a partition or selling properties are under the rules functions which the Judge may delegate to the Official Referee. The rules of practice in English Courts do not apply *en bloc* to the original side except so far as our own rules modify them.

W. S. Krishnaswami Naidu for Appellant.

A. Seshachariar for Respondent.

K. S.

Lakshmana Rao, J. Crl. R. C. Nos. 1002 and 1003 of 1939 and
2nd February, 1940. Crl. R. P. Nos. 942 and 943 of 1939.

Indian Companies Act (VII of 1913), S. 277-L—Default by directors in maintaining requisite cash reserve—Ordinary director not knowingly and wilfully a party to the default—Propriety of conviction under S. 277-L.

Where the evidence does not warrant the conclusion that an ordinary director was knowingly and wilfully a party to the default to maintain the requisite cash reserve, a conviction of such director under S. 277-L of the Indian Companies Act must be set aside.

P. Govinda Menon and *T. K. Raman Nambissan* for Petitioners.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

Venkataramana Rao, J. S. A. No. 1104 of 1938.
12th January, 1940.

Transfer of Property Act (IV of 1882), Ss. 65-A, cls. 2 (a) and 2 (c) and 65-A—Kuzhikanam lease—Malabar Tenancy Act, S. 18, entitling lessee to right of renewal—If lease binding on mortgagor.

Cl. 2 (*a*) is qualified by cl. 2 (*c*) and any lease which the mortgagors may execute in accordance with the local law or usage must not contain a covenant for renewal. By virtue of S. 18, Malabar Tenancy Act, a cultivating kuzhikanomdar is entitled to get a renewal though there is no covenant. Therefore such a lease materially impairs the value of the security of the mortgagee and cannot bind the mortgagee under S. 65-A of the Transfer of Property Act.

M. C. Sridharan for Appellant.

O. T. G. Nambiar for Respondent.

K. S.

King, J. C. R. P. No. 150 of 1936.
16th January, 1940.

Promissory note insufficiently stamped—Suit on contract of loan—When maintainable.

Even where a promissory note contained "all the terms of the contract come to earlier in the day" plus one additional term, the plaintiff was incompetent to sue upon the contract of loan It cannot be said that the promissory note does not carry out all the terms of the contract come to earlier in the day.

Perumal Chettiar v. *Kamakshi Ammal*, I.L.R. (1938) Mad. 933 (F.B.), followed.

P. S. Narayanaswami Aiyar for Petitioners.

C. K. Viswanatha Aiyar for *Parakat Govinda Menon, A. S. Srinivasa Aiyar* and *S. Seshadri* for Respondent.

K. S.

Burn, Offg. Chief Justice and Krishnaswami Aiyangar, J. Appeal No. 71 of 1937.
16th January, 1940.

Power-of-attorney—Power to discharge debts and to execute documents afresh if necessary—If carries with it power to agree to the payment of interest for the amount for which document was to be executed.

Where a power-of-attorney conferred the power to discharge the debts due by the principal and to execute documents afresh if necessary,

Held, the power carries with it a power to agree to the payment of interest for the amount for which the document was to be executed.

A. Lakshmayya for Appellant.

P. Satyanarayana Rao for Respondent.

K. S.

Burn and Lakshmana Rao, JJ. Crl. R. C. No. 966 of 1939 and
24th January, 1940. Crl. R. P. No. 913 of 1939.

Criminal Procedure Code (V of 1898), S. 488—Imprisonment for failure to pay wife's maintenance ordered under S. 488 without sufficient cause—

Filing of insolvency petition by husband and obtaining order for release under S. 23 (1) of Provincial Insolvency Act—If sentence of imprisonment to be cancelled.

A husband who was sentenced to simple imprisonment for failure to obey the order to pay his wife maintenance under S. 488 without sufficient cause later obtained an order under S. 23 (1) of the Provincial Insolvency Act for release. He applied to the magistrate for release from imprisonment,

Held, in every case it is the duty of the Magistrate to find out whether the person ordered to pay maintenance under S. 488 has or has not failed without sufficient cause to comply with the order. Neither the protection order nor the adjudication order could be conclusive on this point. The question is one of fact which the Magistrate has to decide himself and the Magistrate's hands are not tied down by the order of the Insolvency Court. The husband is not under imprisonment in execution of a decree of any Court for payment of money under S. 23 of Provincial Insolvency Act. Even discharge in the insolvency does not free the husband from liability to obey an order under S. 488, Criminal Procedure Code. *Vide* S. 44 (*d*) of the Provincial Insolvency Act.

N. Rangachariar for Petitioner.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

King, J. A. A. O. No. 601 of 1938.
25th January, 1940.

Specific performance—Decree containing clause for dismissal of suit or appeal on failure by plaintiff to make a deposit with in a certain time—If "error apparent on the face of the record"—Review under Civil Procedure Code, O. 47, rr. 1 and 2 by succeeding presiding officer.

In suits for specific performance, no such clause, as the inevitable dismissal of a suit or appeal on failure to make a deposit within a certain time can be included. Such a decree is bad as containing an "error apparent on the face of the record" and the Court is competent to grant an application for review though the decree itself was passed by the predecessor of the presiding officer.

I.L.R. 46 Mad. 148 and 59 M.L.J. 351, applied.

V. Subramanyan for Appellant.

V. Viyanna for Respondent.

K. S.

Burn and Lakshmana Rao, JJ. C. M. A. No. 168 of 1939.
30th January, 1940.

Civil Procedure Code (V of 1908), O. 9, r. 13—Ex parte decree on merits—If only remedy appeal or if it can be set aside under O. 9, r. 13.

There is nothing in I.L.R. 41 Mad. 286 to support the view that the only remedy is an appeal when the decision is 'on the merits'. All suits tried *ex parte* are decided on the merits and not otherwise and the defendant may apply to the Court for an order to set it aside.

V. Viyyanna for Appellant.

Ch. Raghava Rao for Respondent.

K. S.

Burn, J. S. A. No. 1212 of 1936.
1st February, 1940.

Madras Hereditary Village Offices Act (III of 1895), S. 21—If bar to a suit for partition of inam land between persons where rights to the shares has been already established.

Where the suit is not a suit for recovery of the emoluments of a village office but a suit for partition of the land between two persons whose right to the inam in equal shares has already been established the suit is not barred by S. 21 of Madras Act III of 1895.

M. S. Ramachandra Rao for Appellant.

Challa Rama Rao for Respondent.

K. S.

Abdur Rahman, J. C. R. P. No. 1370 of 1938.
2nd February, 1940.

Practice—Trial Court—Competence to implead necessary parties.

A plaintiff impleaded certain persons who, he alleged, were merely tenants in the property for the possession of which he was suing. They pleaded that they were paying rent to another person who claimed to have been acting on behalf of his brothers as well. He and his brothers were therefore impleaded.

Held, the trial Court was fully competent to implead any person considered necessary in order to enable the Court to adjudicate effectually and completely all questions involved in the suit.

Ch. Raghava Rao and *S. Ramachandran* for Petitioner.

W. S. Krishnaswami Naidu for Respondent.

K. S.

Abdur Rahman, J. C. R. P. No. 269 of 1937.
2nd February, 1940.

Indian Contract Act (IX of 1872), S. 25 (3)—Promise to pay portion of barred debt—If provides good cause of action for whole debt.

If a person promises to pay only a portion of the debt which is barred by limitation he can only be sued for that portion alone and not for the whole debt. In the absence of an express promise to pay the portion of the debt sued for it cannot be recovered.

P. Govinda Menon for Petitioner.

N. R. Sesha Aiyar for Respondent.

K.S.

Burn and Lakshmana Rao, JJ. R. T. No. 2 of 1940.
5th February, 1940.

Crimes—Confession—If to be rejected merely because medical evidence is clear that death was caused in different way.

In a case of murder where the accused had confessed to causing death by strangulation with the fingers the defence suggested that the confession ought to be entirely rejected because the evidence of the doctor makes it clear that the woman might very well have been killed by strangulation with a piece of rope.

Held, the mere fact that the accused in his confession has given a wrong or an incomplete description of the way in which he brought about the victim's death is not a reason for finding the accused not guilty.

T. R. Thyagarajan for the Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K. S.

Burn and Lakshmana Rao, JJ. .. A. A. O. No. 7 of 1940
6th February, 1940.

Madras Agriculturists' Relief Act (IV of 1938), S. 4 (g)—"Maintenance"—If possesses any technical meaning.

"Maintenance" in S. 4 (*g*) of Madras Act IV of 1938 is not defined and cannot be supposed to have any technical meaning. Where a payment is meant for the maintenance of a decree-holder it will come under "maintenance" in S. 4 (*g*) of the Act.

K. V. Ramachandra Aiyar for Appellant.

Respondent not represented.

K. S.

King, J. S. A. No. 915 of 1936.
9th January, 1940.

Res judicata—*Finding in prior litigation concerning another item of property acquired under same gift deed that property was* tavazhi—*Subsequent litigation as to the other items—Issue as to nature of acquisition—If barred by* res judicata.

In an earlier suit (to which the parties in the later suit were co-defendants) relating to one of the items of property acquired under the same gift deed the decision was that the property was *tavashi,*

Held, the finding was *res judicata* in a later suit as to the nature of the properties acquired under the gift and even though the prior decision is erroneous in law, it is *res judicata* not only regarding the actual item involved in the prior litigation but also to the other items of property.

(1937) 1 M.L.J. at 233, distinguished.

K. Kuttikrishna Menon for Appellant.

O. T. G. Nambiar for Respondent.

K. S.

Burn and Lakshmana Rao, JJ. C. M. A. No. 460 of 1938.
6th February, 1940.

Civil Procedure Code (V of 1908), O. 9, r. 13—Application under pending trial—Interim order on applicant to deposit costs of suit or furnish security for decree amount—Power to make.

Pending trial of an application under O. 9, r. 13 of the Civil Procedure Code, the Subordinate Judge had no power to order that the applicant should deposit the costs of the suit or furnish security for the decree amount. If he had dealt with the application on its merits and had decided to grant it merely prescribing conditions under O. 9, r. 13 no appeal would have been entertained. The Judge could not dismiss the application for not furnishing security.

T. L. Venkatarama Aiyar for Appellant.

G. N. Chari for Respondent.

K. S.

[F. B.]

The Chief Justice, King and Krishnaswami Aiyangar, JJ. O. P. No. 255 of 1938
6th February, 1940.

Income-tax Act (XI of 1922), S. 4 (2)—Money from outside British India—Investment in Mysore bonds—Assessment on the face value of bonds—Whether income coming within the meaning of "receipt of income within British India."

A merchant out of profits earned at Saigon, sent Rs. 69,000 to Mysore and bought Mysore Government bonds of the value of Rs. 60,000. They were later deposited with the Imperial Bank of India, Madras for safe custody. On their security Rs. 30,000 was borrowed on overdraft account and lands were purchased. The merchant was assessed income-tax on Rs. 60,000 the face value of the bonds, as income 'brought' into British India.

Held, that as the 'income' was capitalised when the bonds were purchased at Mysore and they were not brought to India to be converted and used as income, there was no receipt of income within the meaning of S. 4 (2) of

the Income-tax Act and the merchant was not liable to be assessed in respect of the face value of the bonds.

(1940) 1 M.L.J. 137 (P. C.) and 5 Tax Cases 502, followed.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for the Assessee.

K. V. Sesha Aiyangar for The Income-tax Commissioner.

K. C.

Burn and Lakshmana Rao, JJ. A. A. O. No. 588 of 1938.
7th February, 1940.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Appealability—Orders passed before new rules when execution petition pending—If come under Civil Procedure Code, S. 47.

In an appeal before the coming into force of the new rules,

Held, orders under S. 19 of Madras Act IV of 1938 cannot be deemed to be orders under S. 47, Civil Procedure Code, even when execution petitions are pending. The application under S. 19 has to be made to the Court which passed the decree and it is not a matter relating to the execution of the decree in any sense. If decree is scaled down an appeal will lie from the new decree, but if the application is dismissed no appeal can lie.

Observation in (1939) 2 M.L.J. 853 held to be *obiter dictum* and not followed.

(1939) 2 M.L.J. 109, referred to.

R. S. Srinivasacharya and *K. V. Rajagopalan* for Appellant.

S. Ramaswami Aiyar for Respondent.

K. S.

Pandrang Row and Horwill, JJ. A. S. No. 7 of 1937.
8th February, 1940.

Transfer of Property Act (IV of 1882), S. 18—Dedication of lands for private charity—Public to be benefited by the private charity—Whether valid—Part of trust pooja at tomb—If bad for perpetuity.

One '*M*', a Roman Catholic Christian, executed an agreement whereby he relinquished his interests in his properties in favour of his sons and directed them to pay off his debts. He set apart 47 acres of Nanja and Punja lands for a charity called 'Chinnayya Odayar Samathi Charity' for defraying the expenses of Pooja, etc., at the tomb of his father Chinnayya Odayar and of feeding pilgrims during the annual festival at Velanganni and for supplying oil to 1,000 persons during that time. A creditor of '*M*' attached the charity properties and *M's* claim was allowed and the creditor sued for a declaration that the charity was an illusory one and otherwise invalid. The lower Court upheld the charity, though it was of the view that part of the dedication, namely, for Pooja at the tomb of Chinnayya Odayar was bad for perpetuity.

Held, that the entire trust was valid. A private charity for the benefit of the public can be created and it will be saved by S. 18 of the Transfer of Property Act.

I.L.R. 15 Mad. 424 may not be good law after (1919) A.C. 815.

(1937) 1 M.L.J. 166 (P. C.), followed.

V. Ramaswami Aiyar for Appellants.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Respondent.

K. C.

Burn and Lakshmana Rao, JJ. R. T. No. 177 of 1939.
13th February, 1940.

Criminal trial—Failure to examine other persons who were present—If ground for discrediting, clear evidence of eye-witnesses.

It was suggested that other witnesses who were present ought to have been examined though other eye witnesses had given evidence,

Held, the evidence of the eye-witnesses who were present cannot be discredited merely because other persons who were present did not give evidence.

V. T. Rangaswami Aiyangar and *K. S. Sankara Aiyar* for Appellants.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

King, J. C. R. P. Nos. 1208 of 1938 and 57 of 1939.
14th February, 1940.

Civil Procedure Code (V of 1908), O. 21, r. 92 (1) and O. 43, r. 1 (g)—Order refusing to entertain an application to set aside a sale because applicant failed to make a deposit—Appealability under O. 43, r. 1 (g).

On the language both of O. 21, r. 92 (1) and of O. 43, r. 1 (*g*) there is a right of appeal from an order refusing to entertain an application (under O. 21, r. 90, Civil Procedure Code, to have a sale set aside) because the applicant failed to make a deposit.

I.L.R. 1939 Mad. 340, relied on.

P. Govinda Menon for Petitioner.

K. P. Raman Menon for Respondent.

K. S.

King, J. A. A. O. No. 123 of 1939.
15th February, 1940.

Indian Oaths Act (X of 1873), S. 11—Evidence given on special oath—Whether conclusive for all purposes or only in proceedings in which such evidence was given—Civil Procedure Code—O. 21, rr. 100 and 103—Order in claim proceedings—If res judicata *in suit under r 103.*

In an application under O. 21, r. 100, Civil Procedure Code, to redeliver to the applicant a portion of the house to which he claimed title, against the decree-holder who had obtained possession in execution, the applicant who was challenged to swear on oath that the suit property belonged to him accepted the challenge and the property was delivered. In a subsequent suit under O. 21, r. 103, Civil Procedure Code,

Held, the only proper method of interpreting S. 11 is to interpret it in conjunction with Ss. 8 and 9 and its primary meaning must be that the evidence given in any proceeding in which a challenge has been made and an oath has been taken shall be in that proceeding conclusive proof of the matter stated. It cannot automatically be evidence at all except in the proceeding in which it is actually being received. If there is a subsequent proceeding, then until that statement made on oath is brought into that subsequent proceeding it cannot even be considered.

Unless it is clearly present to the minds of the parties that the evidence which is going to be given in the claim petition is in no manner to be challenged in or by a subsequent suit an oath in those claim proceedings must relate to the claim proceedings themselves and to them alone.

N R C

The doctrine of *res judicata* cannot apply because the order on claim petition is specifically made subject by provisions of Civil Procedure Code itself to the result of a suit under r. 103.

K. V Ramachandra Aiyar for Appellant.

K Bhashyam Aiyangar and *T. R. Srinivasan* for Respondent.

K. S. ——

Lakshmana Rao, J. Crl. R. C. No. 1100 of 1939
15th February, 1940. (Crl R. P. No. 1035 of 1939).

Criminal trial—Marking of irrelevant document in evidence—If ground for ordering retrial.

The marking of an irrelevant document in evidence is not a ground for ordering a retrial.

V. T. Rangaswami Aiyangar and *K. Kalyanasundaram Aiyar* for Petitioner.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S. ——

The Chief Justice and Krishnaswami Aiyangar, J. C. M. P. No. 539 of 1939.
20th February, 1940.

Madras Debt Conciliation Act (XI of 1936)—If Debt Conciliation Board has power to scale down debts under Madras Agriculturists' Relief Act.

The Board is merely concerned with the settlement of the debts in accordance with the Madras Debt Conciliation Act. Scaling down of debts under Madras Act IV of 19·8 is for the Courts and not for a Debt Conciliation Board. The Board has no power to scale down debts.

(1939) 2 M. L. J. 789, followed.

T. S. Narasinga Rao for Petitioner.

N. Appu Rao for Respondent.

K. S. ——

King and Lakshmana Rao, JJ. C. C. C. A. No. 28 of 1939.
21st February, 1940

Hindu Law—Husband and wife—Receipt of separate maintenance by wife—If "judicial separation" from husband—Effect on right to deceased husband's Government Provident Fund amount.

A Government servant in respect of his Provident Fund amount had nominated his concubine excluding his wife on the ground that she was judicially separated from him as she was in receipt of separate maintenance. On his death the widow filed a suit for a declaration that the nomination of the concubine was invalid and that she alone was entitled to the amount.

Held, the widow was entitled to the amount and it could not be implied that she was judicially separated from her husband.

A. V. Viswanatha Sastri and *S. Amudachari* for Appellant.

A. Subramanyam and *C. Vedagirirama Sastri* for Respondent.

K. S. ——

Lakshmana Rao, J. Crl. R. C. No. 998 of 1939.
21st February, 1940. Taken up No. 10 of 1939.

Criminal Procedure Code (V of 1898), S. 182—Complainant cheated and parting with money at Trichinopoly—If case can be tried by Sub-divisional Magistrate, Trichinopoly.

Where the complainant was cheated and parted with the money at Trichinopoly the case can be tried by the Sub divisional Magistrate of Trichinopoly.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

Accused not represented.

K. S.

Lakshmana Rao, J. Crl. R. C. No. 158 of 1940.
22nd February, 1940. Crl. R. P. No. 150 of 1940.

Madras Prohibition Act (X of 1937), S. 4 (1) (a)—Offence under—Ignorance of accused—If excuse.

The ignorance of the accused of the introduction of prohibition in the district is no excuse for an offence under the Madras Prohibition Act (X of 1937), S 4 (1) (a).

A. Nagarajan and *A. Viswanathan* for Petitioner.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

Lakshmana Rao, J. Crl R C. No. 1051 of 1939.
22nd February, 1940. Crl R.P No 987 of 1939.

Madras Local Boards Act (XIV of 1920), S. 164 (2)—Requisition order for land—Prosecution for failure to comply with—Board, if to establish its title to the land—Duty of Magistrate to decide lagality of requisition.

The accused was prosecuted for failure to comply with a requisition under S. 164 (2) of the Madras Local Boards Act and he was acquitted on the ground that the Local Board should establish its title and possession of the land in the Civil Court before invoking the provisions of the Madras Local Boards Act.

Held, the acquittal was erroneous and it is incumbent on the Magistrate to decide the legality or otherwise of the requisition.

M. Raghupathy Reddy for Petitioner.

C. R. Krishna Rao for Respondent.

The Public Prosecutor (V L. Ethiraj) for the Crown.

K. S.

Lakshmana Rao, J. Crl R. C. No. 940 of 1939.
22nd February, 1940. Crl. R. P. No. 888 of 1939.

Madras Local Boards Act (XIV of 1920), S 159(1)—Encroachment in public street—Claim of Panchayat Board to alleged encroachment—Question—If of a civil or criminal nature.

The accused was prosecuted for failure to remove an encroachment in a public street and was acquitted on the ground that "the question of establishing the Panchayat Board's title or claim to the alleged encroachment is purely of a civil nature. On revision,

Held, the acquittal was erroneous and the Magistrate has to decide the legality or otherwise of the notice under S. 159 (1) of the Madras Local Boards Act.

B Jagannadha Das for Petitioner.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

Respondent not represented.

K. S.

Lakshmana Rao, J. Crl. R. C. No. 1094 of 1939.
22nd February, 1940.

Indian Penal Code (XLV of 1860), S. 193—Allegation in plaint false—Offence under S. 193—Necessity for complaint by Court—If can be evaded by party filing a complaint of defamation.

A complaint was founded on an allegation in a plaint in a suit for partition and recovery of the share of the vendor of the accused in the family properties,

Held, if the allegation was false the offence would be one under S. 193, Indian Penal Code. A complaint by the Court is necessary for a prosecution for an offence under S. 193, Indian Penal Code, and the parties cannot be permitted to evade that provision of law by filing a complaint of defamation.

A. Bhujanga Rao for Petitioner.

A. Gopalacharlu for Respondent.

The Public Prosecutor (*V. L Ethiraj*) for the Crown.

K. S.

[F. B.]

The Chief Justice, King and Krishnaswami Aiyangar, JJ. O. P. No. 220 of 1937.

23rd February, 1940.

Indian Income-tax Act (XI of 1922), S. 4 (2)—Foreign income—Remittance from borrowing under overdraft—Whether remittance of capital or income—Availability of sufficient foreign income in the year—Effect.

Where there was income available in Saigon during the accounting year the remittance to British India must be deemed to be a remittance of income and the continued existence of an overdraft did not prevent the inference that the remittance was one of income.

T. R. Venkatarama Sastriar with *M. Subbaroya Aiyar* for Assessee.

K V. Sesha Aiyangar for the Commissioner of Income-tax.

K. S.

Lakshmana Rao, J. Cr. R. C No. 652 of 1939 and

23rd February, 1940. Cr. R. P. No. 610 of 1939.

Indian Penal Code (XLV of 1860), S. 504—Saying during discussion "shameless fellow. I will shoe you"—If offence under S. 504.

When the petitioner, a Bill Collector, went to the complainant for collection, the complainant stated that he would pay in a week and during the discussion that followed the petitioner shouted "shameless fellow. I will shoe you."

Held, this did not amount to an offence under S. 504, Indian Penal Code.

V. T. Rangaswami Aiyangar for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

Respondent not represented.

K. S.

[F.B.]

The Chief Justice, King and Krishnaswami Aiyangar, JJ. C. R. P. No. 729 of 1938.

23rd February, 1940.

Land Acquisition Act (I of 1894), S. 3 (d)—Decision of Subordinate Judge appointed under—Appealability under Civil Procedure Code.

The decision of the Subordinate Judge as a judicial officer appointed by the local Government under S. 3 (*d*) of the Land Acquisition Act to perform the functions of the Land Acquisition Court is a decree and is appealable under the Civil Procedure Code in the ordinary way.

43 M L.J. 78: L.R. 49 I.A. 129: I.L.R. 45 Mad. 320 (P.C.) and A.I.R. 1939 All. 460, relied on.

66 M.L.J. 43: I.L.R. 57 Mad. 271 (F.B.), discussed.

K. Narasimha Aiyangar and *D. Ramaswami Aiyangar* for Petitioner.

T.M. Krishnaswami Aiyar and *A. Balasubramania Aiyar* for Respondent.

K. S.

King, J. Appeal No. 98 of 1938.
25th January, 1940.

Costs—Suit on mortgage—False defence by puisne mortgagee of tender and refusal by mortgagee—If justifies order for costs against puisne mortgagee personally—Principles for awarding costs personally against persons other than mortgagor.

In a suit on a mortgage the puisne mortgagees raised a defence that there was a tender by them and refusal. This was found against and in the mortgage decree because of the false contention of tender the puisne mortgagees were made personally liable for plaintiff's costs. On appeal

Held: Though the Court has a discretion to order costs to be paid by persons other than the mortgagors themselves the discretion must be exercised judicially. But a person who is not himself a mortgagor should be made liable only for those costs which his own conduct has definitely necessitated.

D. Ramaswami Ayyangar for Appellants.

V. N. Venkatavaradachariar for Respondents.

K. S.

King, J. C. M. A. No. 275 of 1938.
15th February, 1940.

Deed—Construction of—'Heir', meaning of—Partition of joint family—Provision as to succession in the event of circumstances happening.

Four brothers divided themselves from their two step-brothers. In the partition deed, it was provided that if any of the brothers died without issues (santhathi), the heirs (varsugal) of the other brothers must get his properties. One of the brothers died without issues leaving two other brothers and a son of another brother who died previously. The son of the predeceased brother claimed the properties to the exclusion of the sons of the other two living brothers on the ground that there could be no heir to living persons and he alone answered the description "heir" of the other brothers. The lower Court held that the word "heir" need not necessarily mean 'heir' to deceased person and that in the deed in question it was used in a technical sense.

Held, the construction of the lower Court was correct.

M. S. Venkatarama Aiyar for Appellant.

K. V. Ramachandra Aiyar and *T. R. Srinivasan* for Respondents.

K. C.

The Chief Justice and A. S. No. 188 of 1937.
Krishnaswami Aiyangar, J.
28th February, 1940.

Transfer of Property Act (IV of 1882), S. 53—Civil Procedure Code (V of 1908), O. 1, r. 8—Sale of property in fraud of creditor's—Suit on behalf of creditors—Represented by one—Conflict if any between S. 53 of Transfer of Property Act and O. 21, r. 63 of Civil Procedure Code.

The 1st respondent, an Association, obtained a simple money decree against a person (2nd respondent) for some amount on 1931. In 1934 the 1st respondent attached five items of properties alleged to belong to the 2nd res-

pondent. Consequent to the said attachment the wife of 2nd respondent the appellant herein, preferred a claim under O. 21, r. 58, Civil Procedure Code, and prayed for the raising of the attachment on the five items of property on the strength of a sale-deed dated 16th September, 1932, executed in her favour by the second respondent. The claim was allowed. Consequently the present suit was filed by the 1st respondent as plaintiff for a declaration that the sale-deed Ex. I in the case was a nominal document or in the alternative was in fraud of creditors which was executed in order to defeat and delay creditors. The 1st respondent had previous to the institution of the suit obtained the permission of the Official Receiver in whom the estate of the 2nd respondent had vested by the adjudication of the 2nd respondent as insolvent. The plaint was filed on 6th April, 1936 The lower Court held that the sale-deed, though not a nominal document, was a fraud on creditors and was not a *bona fide* transaction and so vacated the claim order.

Held, that as the suit fell within S. 53, Transfer of Property Act, the suit should have been brought in a representative character. The 1st respondent ought to have obtained permission under O. 1, r. 8, Civil Procedure Code.

The words 'on behalf of or for the benefit of' in S. 53 are taken from O. 1, r. 8. If a suit in a representative capacity is to be filed it can be brought only under O. 1, r. 8 [*See* 56 M. 657 (P.C.)].

Before the amendment of S. 53, Transfer of Property Act there was a conflict in India between the various High Courts on the question whether a suit under S. 53 ought to be filed in a representative capacity. The Madras High Court held that it was not necessary to do so in a suit under O. 21, r. 63.

I.L.R. 42 Mad. 143; I.L.R. 43 Mad. 760 (F.B.).

I L.R. 34 C. 999; I.L.R. 16 Bom. 1; 27 B. 146, referred to.

S. 53, Transfer of Property Act and O. 21, r. 63 are not in conflict as S. 53 as amended does not take away the right to sue. When the decree-holder sues he must sue under S. 53 after getting permission under O. 1, r. 8. The respondent not having complied with the requirements of S. 53 the suit should be dismissed (*See* I.L.R. 12 Rang. 666; I.L.R. 12 Rang. 670; A.I.R 1936 Cal. 783.)

M. S. Venkatarama Aiyar and *K. V. Srinivasa Aiyar* for Appellants.

K. Bhashyam and *V. Meenakshisundaram* for Respondents.

K. C.

Venkataramana Rao and Abdur Rahman, JJ. Appeal No. 21 of 1937.
6th February, 1940.

Hindu Law—Gifts—Powers of father over immovables—Unreasonableness of gift—Effect—Dowry received by coparcener thrown into 'hotch pot'—Effect.

The plaintiff, a Hindu son, filed a suit against his father for partition, and sought to declare that the gift of immovable property made by the father in favour of his daughter was void as being unreasonable and excessive and also claimed the dowry (*katnams*) given to the plaintiff at the time of his marriage when he was a minor as his self-acquisition,

Held, that the gift *in toto* must fail when once it was found excessive and beyond the reasonable powers of a Hindu father, and there was no authority for the proposition that it could be reduced to a reasonable limit by a Court of law.

Held, further, that *katnams* given in Hindu families to bridegrooms at the time of marriage are normally thrown into the hotchpot and rarely separate claims are made and where the son after attaining majority does not claim this as his self-acquisition particularly at the time when disputes arose for partition between the parties it must be presumed that they are thrown into the common stock.

V. Govindarajachari and *K. Someswara Rao* for Appellants.

P. Vallabhacharyulu for Respondents

K. S.

Pandrang Row and Horwill, JJ. Appeal No. 328 of 1937.
6th February, 1940.

Mortgage—Contract that mortgagors should sell some lands to mortgagee—How far discharge of mortgage—Suit on mortgage—Maintainability.

An executory contract can amount to a discharge of a mortgage-debt, but there is no presumption in law that it does so. The mere recital in the plaint that the plaintiff had entered into a contract with the mortgagors (the defendants) that the defendants should sell their property to the mortgagee is not tantamount to an admission that the mortgage is no longer in existence. The suit on the mortgage is maintainable and a decree can be passed on the mortgage.

P. Satyanarayana Rao and *M. V. Nagaramayya* for Appellants.

B. Sitarama Rao and *N. Vasudeva Rao* for Respondents.

K. S.

[F. B.]

The Chief Justice, King and Krishnaswami Aiyangar, JJ. A. A. A. No. 109 of 1937 and C. R. P. No. 1188 of 1937.
7th February, 1940.

Civil Procedure Code (V of 1908), O. 21, r. 89—Judgment-debtor privately assigning a mortgage to decree-holder and depositing the balance in Court on the re-opening day (the 30th day after sale happening to be a day on which Court was closed)—Application on that day for setting aside the sale—If compliance with O. 21, r. 89—General Clauses Act (X of 1897), S. 10—Applicability.

A sale in execution of a decree took place on 2nd December, 1935. On the 2nd January, 1936, the judgment-debtor assigned to the decree-holder a

mortgage (which had been executed in their favour) in part satisfaction of the amount due under the decree. A small balance of Rs. 10 was due under the decree. Court closed for the Christmas vacation some days before 20th December, 1935 and did not reopen until the 3rd January, 1936. On that date the judgment-debtor paid into Court Rs. 10 with an application for setting aside the sale. It was contended by the decree-holder that the full amount ought to have been deposited in Court within 30 days of the sale and non-fulfilment of this condition vitiated the application and that the deposit must be in cash only.

Held, any payment or adjustment made by the judgment-debtor which satisfies the decree-holder is a payment within the meaning of O. 21, r. 89. Where the decree-holder was paid most of the amount due to him by assignment of a mortgage out of Court and the small balance was deposited into Court by the judgment-debtors when they made the application for setting aside the sale, it is sufficient compliance with O. 21, r. 89.

Per *Krishnaswami Aiyangar, J.*—O. 21, r. 89 of the Code does not contemplate payment in cash and in cash only.

Where the 30th day after the sale (within which the amount is to be deposited and the application made for setting aside the sale) was a day on which the Court was closed the balance of amount after adjustment by assignment of a mortgage can be deposited and the application made on the day the Court reopens. What is done by consent of parties as a substitute for the deposit is to be regarded as its equivalent in every respect and judged by the same principles as those applicable to a deposit. S. 10, General Clauses Act, applied and deposit on the reopening date was sufficient.

Srinivasaraghavan and *Thyagarajan* for Appellant-Petitioner.

T. R. Srinivasa Aiyangar and *N. T. Raghunathan* for Respondents.

K. S.

Burn, J. S. A. Nos. 149 and 185 of 1937.
16th February, 1940.

Husband and wife—Husband found not entitled to restitution of conjugal rights—Right of wife to maintenance—Legal cruelty—If essential.

It is not, necessary that the wife should prove actual cruelty in order to entitle her to a decree for separate maintenance. On the other hand it is logical that if the husband is found to be not entitled to a decree for restitution of conjugal rights (because he had virtually abandoned her) the wife should be held entitled to a decree for a separate maintenance.

71 M.L.J. 499, relied on.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Appellant in S. A. No 149 of 1937 and Respondent in S. A. No. 185 of 1937.

S. Parthasarathi and *V. K. Tiruvenkatachari* for Respondent in S. A. No. 149 of 1937 and Appellant in S. A. No. 185 of 1937.

K. S.

Horwill, J. S. A. No. 214 of 1937.
21st February, 1940.

Hindu Law—Maintenance—Husband marrying second wife and inviting his mother-in-law to live with him—If sufficient ground for awarding separate maintenance to first wife.

Neither a man's marrying a second wife nor his inviting his mother-in-law to live with him has ever been held to be a sufficient cause for awarding separate maintenance to his first wife.

P. V. Rajamannar and *K. Subba Rao* for Appellant.

K. Kottayya and *S. Sitharama Aiyar* for Respondents.

K. S.

Horwill, J. S. A. Nos. 261 and 262 of 1937.
21st February, 1940

Survey and Boundaries Act (VIII of 1923), S 14—Suits under by private persons as to boundaries—Survey officers if represent the Government and Government if necessary or proper parties to such suits.

The decisions given under the Survey and Boundaries Act are by survey officers who, though appointed by the Government in no sense represent them in their actions under the Survey and Boundaries Act. Their decisons are binding on the parties in the absence of a suit. The Government was not in the least interested in the result of the suits, for the survey officer in making his decisions acted not as an agent of the Government, but as a statutory officer specially empowered under the Act. The Government is neither a necessary nor a proper party to the suit and Government if impleaded is entitled to its costs from the plaintiff.

The Government Pleader (B. Sitarama Rao) for Appellant.

K. Kameswara Rao for Respondent.

K. S.

King, J. A.A.A. O. Nos. 184 and 185 of 1935.
23rd February, 1940.

Hindu Law—Coparcener disqualified from claiming a share in joint family property—If can sever his legal connection with family by issuing a notice

A notice by a person who is disqualified from claiming a share in joint family property is inoperative to sever his legal connection with that family.

69 M.L.J. 410, distinguished.

B. Jagannadha Das for Appellant.

T. K. Srinivasa Thathachariar for Respondent.

K. S.

Venkataramana Rao, J. C. R. P. No. 1348 of 1939.
23rd February, 1940.

Practice—Small Cause suit—Contentions raised under Agriculturists' Relief Act—Need to give a judgment dealing with the correctness of the figures in the petition with reasons therefor.

Though a suit is a small cause one, where there was a contention raised under the Agriculturists' Relief Act the trial judge ought to deal with it and give a decision as to the correctness of the figure giving his reasons therefor.

R. Krishnaswami Aiyangar for Petitioner.

T. P. Gopalakrishna Aiyar for Respondent.

K. S.

Krishnaswami Aiyangar, J. C. R. P. No. 2121 of 1939.
23rd February, 1940.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 3 (4) and 15—Tree tax payable under the Madras Estates Land Act—If "rent" within S. 15 of the Madras Act (IV of 1938)—Madras Estates Land Act, S. 77—Decision of Collector in applications for relief under Act (IV of 1938)—If revisable by High Court.

"Tree tax" is not 'rent' under S. 15 of the Madras Agriculturists' Relief Act and a ryot in possession of trees n a holding is not entitled to relief under the Act in respect of tree tax. Interlocutory and other orders made by the Collector under S. 77 of the Estates Land Act are revisable by the High Court.

I.L.R. 42 Mad. 76, followed.

K. Bhashyam Aiyangar for Petitioner.

B. Sitarama Rao for Respondent.

K. S.

Horwill, J. C. R. P. No. 218 of 1940.
26th February, 1940.

Village temple—Right to management—Allowing archakas *to manage small property of the temple—If right of management of villagers lost.*

By allowing the *archakas* for some years to manage the small property of the temple, the villagers did not lose their right of management of the institution or even its property.

K. Umamaheswaram for Petitioner.

K. S.

King and Lakshmana Rao, JJ. R. T. No. 7 of 1940.
27th February, 1940.

Evidence Act (I of 1872), Ss. 26 and 27—Charge of murder—Confession by third accused followed by unsuccessful search by him for a spear said to have been hidden by him—Subsequent production of the spear by first accused—Admissibility of statement of third accused under S. 27, Evidence Act and sufficiency to sustain a conviction.

Three accused were charged with murder. The third accused made a statement to the police and in the search which followed he was unable to find the spear. The first accused afterwards took out and produced the spear.

Held, the discovery of the spear was not in the essential sense of the word due to the information given by the third accused and when the informant has tried unsuccessfully to recover such property the effect of his information has become completely exhausted. The statement does not fall within S. 27 but within S. 26 and is inadmissible in evidence.

P. Basi Reddi for the Accused.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

Horwill, J. S. A. No. 523 of 1937.
26th February, 1940.

Wills—Bequest to widow for her life and provision that after her death it should be enjoyed by daughter's son—Daughter's son predeceasing widow—Person entitled to estate.

A testator left the property to his widow for her life and made provision that after her death it should be enjoyed by his daughter's son. The daughter's son predeceased the widow who then mortgaged the property and subsequently sold the same.

Held, where there is a life estate given to a person, the remainder vests on the testator's death in the remainderman, unless there are very clear words to show that the testator had a contrary intention on the language used in the will. The daughter's son had a vested remainder which passed to his widow on his death.

T. L. Venkatarama Aiyar for Appellant.

A. C. Sampath Aiyangar for Respondent.

K. S.

Venkataramana Rao and Abdur Rahman, JJ. Appeal No. 343 of 1937.
28th February, 1940.

Limitation Act (IX of 1908), S. 20—Joint Hindu family—Pronote by son—Payment of interest and endorsement on pronote by father—If acknowledgment by "person duly authorised in that behalf."

A member of a Hindu joint family cannot, simply because he is a member of that family without specific authority, pay a debt on behalf of the other member so as to enlarge the period of limitation.

C. Rama Rao for Appellant.

Y. Suryanarayana for Respondent.

K. S.

Horwill, J. S. A. No. 70 of 1937.
29th February, 1940.

Indian Contract Act (IX of 1872), S. 72—Person paying property tax to Municipality upon demand in a wrong belief that he was bound to pay—If entitled to recover it in Court of law.

A person who makes a payment of tax under a misapprehension as to his liability to do so cannot recover it in a Court of law, although one would expect a corporate body to refund voluntarily any amount which had been paid to it in error.

Ch. Raghava Rao and *V. V. Sastry* for Appellant.

V. Govindarajachari for Respondent.

K. S.

King, J. A.A.A. O. No. 112 of 1938.
29th February, 1940.

Surety bond—Undertaking liability for decree amount if judgment debtor failed to file an insolvency petition within one month and properly to conduct the proceedings in that insolvency petition etc.—Failure to apply for discharge within the time finally limited—Effect.

N R C

According to the terms of the bond a surety undertook liability for the decree amount if the judgment-debtor failed to file an insolvency petition within one month and properly to conduct the proceedings in that insolvency petition. The insolvent did not apply for discharge within the time finally limited and as a result the adjudication was annulled.

Held, the application for discharge was a proceeding in an insolvency petition. (A.I.R. 1933 Mad. 360 and C. M. S. A. No. 107 of 1929 (unreported) Decision of Curgenven J. followed) and the liability of the surety has arisen under the bond because of the failure of the insolvent to apply for his discharge.

S. T. Srinivasagopalachari for Appellant.

D. Ramaswami Aiyangar, T. P. Kannabhiran and *M. V. Gopalaratnam* for Respondent.

K. S.

Venkataramana Rao and Abdur Rahman, JJ.
29th February, 1940.

Appeal No. 193 of 1937.

Hindu Law—Mother—Right to residence—Non-existence of family dwelling house on the date of her husband's death—If bars right to residence in house constructed with family funds on ancestral land.

The mother is undoubtedly a member of the joint family with her son and she is entitled to claim a right of residence in a house which is owned by the family. Where the site is ancestral and a portion of the family fund is spent towards the construction of the house, the house must be treated as the joint family house of the joint family of both the mother and the son. The mother is entitled to claim a right of residence which can be only defeated by a decree obtained against the son on a debt incurred for family necessity.

I.L.R. 12 Mad. 260 followed.

Absence of family dwelling at the time of her husband's death cannot deprive the mother of her right of residence.

A. V. Narayanaswami Aiyar for Appellant.

T. R. Srinivasa Aiyar for Respondent.

K. S.

[F. B.]

The Chief Justice, King and Krishnaswami Aiyangar, JJ.
4th March, 1940.

S. R. Nos. 32601, 32137 and 28253 of 1939.

Code of Criminal Procedure (V of 1898), Ss. 195 and 476—Criminal Rules of Practice, R. 37—Validity of rule—Complaint in respect of offence alleged to have been committed in relation to a proceeding in Court—Revisional jurisdiction of High Court—Whether Civil or Criminal.

In respect of complaints as to offences alleged to have been committed in relation to proceedings in Court,

Held, A Civil Court does not cease to be a Civil Court when it is considering an application made to it under S. 476, Criminal Procedure Code and if for the purpose of that application it remains a Civil Court it must be governed by the provisions of the Code of Civil Procedure.

An application for revision arising out of proceedings in a civil suit must be dealt with as a Civil Revision Petition and a similar application arising out of Criminal proceedings as a Criminal Revision Petition.

Case-law discussed.

31 M.L.J. 440, followed.

N. Rajagopala Aiyangar for *P. S. Raghavarama Sastri* for Petitioner and *Advocate-General* (*Sir A. Krishnaswami Aiyar*) for Respondents in S. R. No. 32601 of 1939.

K. S. Rajagopalachari for *K. Rajah Aiyar* for Petitioner and the *Advocate-General* (*Sir A. Krishnaswami Aiyar*) for Respondent in S. R. No. 32137 of 1939.

S. Ramachandran for *R. Sundaralingam* for Petitioner in S. R. No. 28253 of 1939.

K. S.

King, J. C. M. S. A. No. 237 of 1938.

5th March, 1940.

Civil Procedure Code (V of 1908), O. 21, rr. 58, 62—Attachment by simple money decree-holder—Claim by mortgagee—Refusal to hold sale subject to mortgage—Effect—Mortgage decree without impleading auction-purchaser—Right to possession of mortgagee decree-holder purchaser as against the simple money decree-holder purchaser—O. 21, r. 97.

A simple creditor obtained a decree against a debtor on 22nd January, 1934 and attached the property of the judgment-debtor on 18th June, 1934. An alleged holder of a simple mortgage on the same property from the same judgment-debtor dated 13th June, 1933 intervened with a claim petition requesting the Court to hold the auction sale subject to his mortgage. The executing Court passed the following order on 7th September, 1934. "In the absence of a note of this alleged mortgage in the encumbrance certificate, the sale cannot be held subject to any such mortgage. This order will be without prejudice to whatever rights petitioner may otherwise have. The petition is dismissed. No costs". The simple money decree-holder became the purchaser and got delivery of the properties on 22nd May, 1935. The mortgagee filed a suit on foot of his mortgage on 11th October, 1934 without impleading the attaching decree-holder and got a decree. He purchased the properties on 25th November, 1935 and was obstructed when he attempted to take possession by the prior purchaser in execution of his simple money decree. The mortgagee decree-holder purchaser applied under O. 21, r. 97 for removal of obstruction. The simple money decree-holder pleaded that the mortgagee was barred under O. 21, r. 63.

Held, the order on the claim petition was an order adverse to the mortgagee and rider added by the executing Court was a mere truism which could not operate to save his rights and the mortgagee was not entitled to claim possession from the simple money decree-holder purchaser.

43 M.L.J. 467; 46 M.L.J. 141; 49 M.L.J. 706 and A.I.R. 1935 Mad. 328 distinguished.

A. Lakshmayya for Appellant.

K. Raghuramayya for Respondent.

K. S.

King, J.
8th March, 1940.

A. A. A. O. No. 232 of 1938.

Surety bond—Judgment-debtor wishing to apply for adjudication as insolvent—Surety binding himself to be liable inter alia *if debtor failed to file insolvency petition or fails to do the necessary things in the matter of that petition—Dismissal of petition for failure of debtor to make a deposit of Rs. 10 demanded by Court—Liability of surety.*

A judgment-debtor against whom execution had been taken out expressed the intention of applying to be adjudicated insolvents. The respondent executed a surety bond in that connection, which provided *inter alia* as follows :—"I the surety do hereby bind myself to pay into Court after one month from this date the decree debt as well as future interest and costs that may be due to the decree-holder, if the defendant fails to file the insolvency petition or if the defendant fails to do the necessary things in the matter of that petition after he has filed it." The petition for adjudication was dismissed on account of the debtor's negligent failure to make an additional deposit of Rs. 10 demanded by the Court.

Held, the moment the insolvency petition was dismissed the liability of the surety arose and the liability once fastened cannot be shaken off by the subsequent conduct of the debtor in filing a second petition for adjudication.

Case-law reviewed.

K. Kuttikrishna Menon and *K. N. Kumaran* for Appellant.

A. Achuthan Nambiar and *K. Govindan* for Respondent.

K. S.

The Chief Justice and Appeal No. 266 of 1937.
Krishnaswami Aiyangar, J.
26th February, 1940.

Hindu Law—Adoption—Refusal of consent by nearest sapindas—Absence of any other sapindas of husband—Effect.

After an examination of the authorities, held that there is no residuary power in a widow to adopt when her husband's sapindas are all dead and the nearest sapinda has refused his consent.

I.L.R. 1938 Mad. 551 (P.C.), referred to.

K. Kamaswara Rao for Appellant.

P. V. Rajamannar and *K. Subba Rao* for Respondent.

K. S.

Horwill, J. S. A. No. 658 of 1936.
27th February, 1940.

Tree patta granted in respect of trees on unoccupied land—Right of Government to resume them and grant them to another with the land.

The tree patta gives the person to whom it is issued, a right to enjoy the usufruct of the trees, the patta being liable to cancellation at the end of the year or at three months' notice. The Government have a right to resume them and grant them to others along with the land.

Evidentiary value of pattas discussed.

The Government Pleader (B. Sitarama Rao) for Appellant.

N. Viswanatha Aiyar and *N. V. Nagaraja Aiyar* for Respondent.

K. S.

Venkataramana Rao and Appeal No. 8 of 1937.
Abdur Rahman, JJ.
28th February, 1940.

Hindu Law—Joint family—Debts—After-born son—Right to question validity of debt contracted by father before his birth—Share which will pass on alienation.

A coparcener born in the family subsequent to an alienation before the death of the other coparceners who could challenge it has a right to the property and therefore a right to challenge the alienation.

I.L,R. 47 All. 795 and L.R 52 I.A. 433 (P.C.) held to be a direct decision and observation in Mayne's Hindu Law (10th Edition) pages 511 and 512, not followed.

At the date of the alienation the father was entitled to a half-share in the joint family with his one son then existing and that interest which was vested in him would pass to the mortgagee and the other half would still be the joint family property and it is only in that half and the equity of redemption of the other half the alienation being a mortgage, the after-born son would be entitled to participate with the other son. The alienee gets the interest which the father was entitled to on the date of the alienation.

I.L.R. 35 Mad. 47, followed.

Case-law discussed.
N R C

V. Govindarajachari and *K. Krishnamurthi* for Appellant.

A. Venkatachalam, *P. Somasundaram* and *P. Suryanarayana* for Respondents.

K. S.

The Chief Justice and Krishnaswami Aiyangar, J.
29th February, 1940.

Appeal No. 188 of 1937.

Transfer of Property Act (IV of 1882), S. 53—Suit for setting aside alienation made with intent to defeat or delay creditors—Necessity to file suit in representative capacity under Civil Procedure Code, O. 1, r. 8.

In a suit by a decree-holder (whose attachment had been raised on a successful claim petition) to avoid the alienation in favour of the claimant as one in fraud of creditors,

Held, as the suit is one contemplated by S. 53 of the Transfer of Property Act the provisions of that section must be applied especially as there is nothing in the section incompatible with O. 21, r. 63, Civil Procedure Code. It is necessary to sue under S. 53 of the Transfer of Property Act in a representative capacity and as that is not done the suit must fail.

Case-law reviewed.

K. V. Srinivasa Aiyar for Appellant.

K. Bashyam and *V. Minakshisundaram* for Respondent.

K. S.

King, J.
4th March, 1940.

S. A. No. 33 of 1937.

Indian Contract Act (IX of 1872), S. 72—Execution against property already sold to stranger—Registered notice by the purchaser and claim petition—Dismissal—Purchase of the property by decree-holder in sale in execution—Deposit of amount under Civil Procedure Code, O 21, r. 89 and setting aside of execution sale—Liability of decree-holder.

A decree-holder attached property which had already been sold to a stranger. The stranger sent a notice protesting against this. The claim petition was however dismissed and the property was purchased by the decree-holder. Then, the purchaser deposited the amount in Court under O. 21, r. 89. No suit was filed to set aside the order dismissing the claim. In another execution against the same property by the same person the purchaser again filed a claim petition which was allowed. The purchaser then filed a suit to recover damages from the decree-holder or in the alternative to recover the amount deposited under O. 21, r. 89, Civil Procedure Code.

Held, the money was paid under legal coercion and the plaintiff is entitled to recover that money from the decree-holder. Failure to file a suit to set aside the order dismissing the claim does not affect the liability of the decree-holder.

34 L.W. 399, followed.

Y. Govindarajulu and *B. L. Narayana* for Appellant.

M. S, Ramachandra Rao and *D. R. Krishna Rao* for Respondent.

K. S.

[F. B.]

The Chief Justice, King and Krishnaswami Aiyangar, JJ. S. A. No. 665 of 1936.
6th March, 1940.

Limitation Act (IX of 1908), Ss. 19 and 20—Mortgage—Purchase of equity of redemption in execution—Loss of personal remedy against mortgagor—Payment after that by mortgagor—Whether payment within S. 20 or acknowledgment within S. 19 to save limitation.

After the equity of redemption had been assigned and after the mortgagees had lost their personal remedy against the mortgagor, the mortgagor made a small payment. In a suit on the mortgage,

Held, the payment cannot save the suit from the bar of limitation.

S. S. Ramachandra Aiyar for Appellants.

M. Krishna Bharathi for Respondents.

K. S.

Burn, J. S. A. No. 40 of 1937.
6th March, 1940.

Madras Hereditary Village Offices Act (III of 1895), Ss. 13 (1) and 21—Suit for declaration as to appointment of karnam—Absence of jurisdiction of Civil Courts.

Plaintiff sued for declaration that the defendant's appointment as karnam was illegal and for registry of his own name as holder of the office which was hereditary.

Held, that the Civil Courts had no jurisdiction in the case. The fact that the defendant was a stranger to the family did not make any difference.

63 M.L.J. 577.

G. Natarajan for Appellant.

The Government Pleader (B. Sitarama Rao) and *V. C. Viraraghavan* for Respondents.

K. S.

The Chief Justice and Krishnaswami Aiyangar, J. C. M. P. No. 262 of 1940.
15th March, 1940.

Madras Debt Conciliation Act (XI of 1936), Ss. 10 and 12—Absence of creditor when petition for conciliation taken up—Order that debt considered to have been discharged—Propriety—Procedure.

A creditor who had submitted a statement under S. 10 of the Madras Debt Conciliation Act was fifteen minutes late for the hearing and the Board made an order purporting to act under sub-S. (2) of S. 10 that the debt was considered to have been discharged. When he applied the Board refused to reopen the matter as he did not offer any explanation for coming late. In a petition for issue of a writ of *certiorari* against the Board,

Held, as a statement had been submitted the Board had no jurisdiction to pass an order holding the debt to be discharged. In as much as the debt was not disputed by the debtors or any other creditor the Board should have dealt with the matter on the basis that the debt was due and owing.

K. Srinivasa Rao for Petitioner.

Respondent not represented.

K. S.

King, J. C. C. C. A. No. 49 of 1938.

19th March, 1940.

Civil Procedure Code (V of 1908), O. 9, r. 13 and O. 23, r. 1—Ex parte *decree against one defendant—Application by him to set aside the decree—Withdrawal of suit against him alone—Effect.*

Plaintiff filed a suit against the defendants for declaring his right to the exclusion of the first defendant and restraining the second defendant from delivering the properties to the first defendant. First defendant set up exclusive title in himself, but became *ex parte*, whereon, a decree was passed against both the defendants. Then the first defendant filed an application to set aside the *ex parte* decree. The plaintiff withdrew his suit under O. 23, r. 1, Civil Procedure Code, against the first defendant.

Held, that the withdrawal of suit against the principal defendant must entail in its entire dismissal as the second defendant's interest is claimed only through the real owner.

Ch. Raghava Rao and *V. V. Sastri* for Appellant.

The Government Pleader (B. Sitarama Rao), K. Ramamurthi and *K. Someswara Rao* for Respondents.

K. S.

The Chief Justice and A. A. O. No. 98 of 1939.
Krishnaswami Aiyangar, J.
13th March, 1940.

Indian Tea Control Act (VIII of 1938), Schedule, Cl. 1—Application to Indian Tea Licensing Committee merely to change the year for determining crop basis—If to be allowed.

The yield of 1932 was selected by the owners of the tea estate for ascertaining its export quota. The Act of 1938 made a change. The company found its crop basis would be better if it selected the year 1929 instead of 1932 and applied to the committee merely claiming the right to change the year and did not apply for any investigation. The Committee rejected the application. On appeal,

Held, in view of the terms of Cl. 1 of the schedule to the new Act the Committee was perfectly right in rejecting the application.

O. T. G. Nambiar and *T. M. Kasturi* for Appellants.

King and *Partridge* for Respondent.

K. S.

Burn, J. S. A. No. 189 of 1937.
14th March, 1940.

Sale of land—Settlement register incorrectly showing an excess in extent of land—Vendor if liable for actual deficiency.

The area of a field was incorrectly shown as 2·22 acres instead of 2·135 acres. The vendor had not interfered with the ridge between his portion and the vendee's portion and the vendor was not shown to have moved the boundary between his land and the land purchased. Though the vendee thought he had bought 79 cents, actually he bought only 70 cents.

Held, there is no reason why the vendor should make this deficiency or any part of it, good.

K. V. Sesha Aiyangar for Appellant.

A. Sundaram Aiyar and *K. S. Sankararaman* for Respondent.

K. S.

Horwill, J. C. R. P. No. 1460 of 1939.
15th March, 1940.

Civil Procedure Code (V of 1908), O. 33, r, 1—Construction—Saleable interest in some items of suit property—Effect on right to sue as pauper.

The comma, after the word "suit" separates the first part of the explanation to R. (1) from the second part; it follows that the expression "other than his necessary wearing apparel and the subject-matter of the suit" qualifies only the second part of the explanation and not the first.

Mulla's Civil Procedure Code commentaries, and 50 M.L.J. 114, relied on. 67 M.L.J. 581 referred to.

Where both sides agree that the plaintiff has a saleable interest in certain items of suit property, it would be contrary to the spirit of O. 33, if the plaintiff could ignore that property on which money could be raised for deciding a petition for leave to sue as a pauper.

K. V. Srinivasa Aiyer for Petitioner.

R. Desikan for Respondent.

K. S.

Burn, J. S. A. No. 226 of 1937.
20th March, 1940.

Civil Procedure Code (V of 1908), S. 11, Expl. IV and O. 2, r. 2—Mortgage—Suit for possession—Later suit for mortgage money—Maintainability.

NRC

Though there is a separate covenant for payment of the mortgage money it gives only one cause of action. On failure of the mortgagor to deliver or procure posssesion, the mortgagee has a cause of action in which he may claim either of two alternative reliefs, possession or the money and not both. Where the mortgagee files a suit for possession only his later suit for the mortgage money is clearly barred under O. 2, r, 2 and S. 11, Expl. IV of the Civil Procedure Code.

V. Viyyanna for Appellant.

P. Satyaharayana Rao and *M. Balakrishnamurthi* for Respondent.

K. S.

Burn, J. S. A. No 201 of 1937.

20th March, 1940.

Husband and wife—Refusal of claim of husband for restitution of conjugal rights—How far ground for claim for separate maintenance by wife.

It will no doubt generally be the case that a wife who is able to resist her husband's claim for restitution of conjugal rights, will be able on those very grounds to claim separate maintenance from him. But it is not a rule of law that the wife's suit for maintenance must succeed if the husband's suit for restitution of conjugal right fails. The right to maintenance depends on the circumstances of each case.

T. L. Venkatarama Aiyar for Appellant.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Respondent.

K. S.

Lakshmana Rao, J. Crl. Appeal No 239 of 1939.

20th March, 1940.

Indian Emigration Act (VII of 1922), S. 30 (3) read with S. 25 (2) (b)—*Assisting labourers to depart from British India—Gist of offence—Tests.*

Where the accused assisted some labourers (by obtaining tickets for them) to depart by land out of British India so as to depart for the purpose of working for hire in a country beyond the sea,

Held, it is an offence made punishable under S. 30 (3) read with S 25 (2) (*b*) of the Indian Emigration Act. The view that assistance means either financial assistance or entering into an agreement to work for hire is unwarranted.

The Public Prosecutor (V. L. Ethiraj) for Appellants.

T. R. Srinivasa Aiyar for Respondent.

K. S.

Lakshmana Rao, J. Crl. R. C. No. 975 of 1939.

21st March, 1940 Crl. R. P. No. 920 of 1939

Madras Marumakkatayam Act (XXII of 1933), S. 4—Conjugal union of marumakkatayi *female solemnised in accordance with customary ceremonies of her community—Whether legal marriage under S. 4 of the Act.*

Where the conjugal union of a *marumakkatayi* female with a male was openly solemnized in accordance with the customary ceremonies of the community to which she belongs, it has to be deemed for all purposes to be a legal marrige under S. 4 of the Madras Marumakkatayam Act.

R. S. Srinivasachari for Petitioner.

R. Venkataraman and *V. Venkataraman* for Respondent.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

[F. B.]

The Chief Justice, Mockett and Krishnaswami Aiyangar, JJ. S. A. No. 921 of 1936.
4th March, 1940.

Civil Procedure Code (V of 1908), O. 41, rr. 11 and 12 (1)—Appeal if can be admitted in part only.

By virtue of r. 11, the appellate Court may dismiss the appeal without serving notice on the respondent but if it does not dismiss the appeal summarily it must by virtue of r. 12 (1) fix a day for hearing "the appeal". There is nothing in either rule which suggests that the Court may admit the appeal in part.

Case-law discussed.

V. S. Narasimhachar for Appellant.

N. Appu Rao and *Ch. Raghava Rao* for Respondent.

K. S.

Horwill, J. C. R. P. No. 2120 of 1939.
21st March, 1940.

Civil Procedure Code (V of 1908), S. 60 (k)—Allowances of Railway guard—If exempt from attachment—Recoveries of advances made from Provident Fund—If to be deducted from attachable salary.

The allowances of a Railway guard over and above his salary are not exempted from attachment. Where the guard had taken an advance from the Provident Fund and that amount was being recovered from him at the rate of Rs. 10 a month, such recoveries are not deposits although they may be compulsory deductions or recoveries and there can be no deduction of this amount from the salary available for attachment.

V. Ganapathi Ayyah and *R. Ramachandra Pant* for Petitioner.

A. Dorairaj for Respondent.

K. S.

Wadsworth, J. C. R. P. No. 833 of 1938.
21st March, 1940.

Civil Procedure Code (V of 1908), Sch. II, Para. 20—Award as a whole exceeding pecuniary jurisdiction though the portion of the award in which applicants are personally interested is within jurisdiction—Jurisdiction.

Where the relief claimed is a decree in terms of the award as a whole (a decree for a general partition of the tarwad properties) though the applicants ask for the confirmation of their possession of the share already handed over to them, which was within the pecuniary jurisdiction of the Court.

Held, "subject-matter of the award" in Para. 20 of Sch. II means the whole and not the whole or a portion of the subject-matter and the application must be returned by the Munsif's Court for presentation in a Court having jurisdiction.

I.L.R. 55 Mad. 689, applied.

10 L.W. 37; 5 M.H.C.R. 128 and I.L.R. 29 Mad. 44, relied on.

P. S. Narayanaswami Aiyar for Petitioner.

P. Govinda Menon and *M. K. Sivarama Aiyar* for Respondent.

K. S.

N R C

King, J. C. C. C. A. No. 27 of 1938.
26th March, 1940.

Husband and wife—Suit for restitution of conjugal rights—Suit by husband who had nothing to do with his wife for 20 years after marriage—Plaintiff rejecting prior offer by wife to join him—Discretion of Court to refuse decree for restitution.

Where the husband who sued for restitution of conjugal rights has had nothing to do with his wife for 20 years after his marriage, and at least 13 years after she attained puberty and had definitely rejected the last offer made by the wife through a family friend to join him,

Held, the Court was justified in refusing the plaintiff a decree for restitution in the exercise of its discretion.

Case-law examined.

T. K. Rangaswami Aiyangar for Appellant.

P. Krishnamachari for Respondent.

K. S.

King, J. C. C. C. A. Nos. 39 to 41 of 1938.
26th March, 1940.

Madras City Tenants' Protection Act (III of 1922)—Land let with reservation to landlord of right to trees growing on it—If comes within definition of "land" in the Act—Decree for eviction not executed—Lessee in possession if "tenant" within definition in S. 2 (4) of the Act.

Though land is let out with a reservation to the landlord of the right to trees growing upon it, it still comes within the definition of "land" in the City Tenants' Protection Act. Where a decree for eviction was never executed though it put an end to the pre-existing tenancy, the lessees are clearly "tenants" within the definition in S. 2 (4) of the Act, as they have continued in possession after the determination of the tenancy.

V. S. Rangachari for Appellants.

S. B. Satyanadar and *N. C. Rangaswami* for Respondents.

K. S.

The Chief Justice and C. M. P. No. 144 of 1940.
Krishnaswami Aiyangar, J.
27th March, 1940.

Madras Debt Conciliation Act (XI of 1936), R. 3—Quorum necessary under—Order passed by chairman sitting alone—Validity.

A father who formed a joint Hindu family with his 3 sons (2 of whom were minors) filed an application for settlement of his debts. A suit filed by the minor sons for partition was pending. The Board dismissed the application as "clearly dishonest" as he did not disclose the partition suit. Then the sons withdrew the partition suit and joined their father in an application to the Board for settlement of the family debts. The chairman sitting singly passed orders declining to reconsider the orders passed in the prior application by the father. R. 3 framed under the Act states the quorum necessary for the transaction of business shall be two of whom one shall be the chairman.

Held, the mere fact that the father omitted to mention the partition suit does not warrant the assertion that his application was dishonest and the order of the chairman sitting singly declining to reconsider the orders was in excess of his powers and even if it was passed by two members of the Board it would still have to be set aside because the board have not applied their minds to the application. As the petitioners were compelled to come to the High Court owing to the arbitrary action of the chairman, who did not offer any explanation, he must pay the petitioner's costs.

V. N. Venkatavaradachariar for Petitioner.

S. Panchapakesa Sastri for Respondent.

K. S.

The Chief Justice and Krishnaswami Aiyangar, J. C. M. P. Nos. 4928, 4929 and 453 of 1939.

27th March, 1940.

Madras Debt Conciliation Act (XI of 1936)—Creditors representing more than 50 per cent. of the debts objecting to settlement—Proper procedure.

It is the duty of the Board to dispose of the application with reasonable promptitude and if it becomes apparent that there are creditors representing more than fifty per cent. of the debts who object to the settlement and there is no hope of an amicable settlement, it will be the duty of the Board to dismiss the application of the debtor for settlement of his debts.

V. V. Srinivasa Aiyangar, P. V. Subramanyam and *P. Somasundaram* for Petitioners.

C. A. Vaidyalingam for Respondent.

K. S.

Patanjali Sastri, J. C. R. P. No. 1581 of 1938.

29th March, 1940.

Madras Agriculturists' Relief Act (IV of 1938)—Usufructuary mortgagee—Suit by mortgagee to recover possession—If a suit to enforce the debt to which scaling down provisions apply—Right of subsequent lessee to raise question as to scaling down of debt.

The petitioner claimed to be a lessee under the mortgagor the third defendant in the suit and sought to file an additional written statement raising the plea that the debt due to the plaintiff is liable to be scaled down under the provisions of Act IV of 1938. The Court below refused to grant leave to file the additional written statement on the ground that the suit by the plaintiff as usufructuary mortgagee to recover possession is not one to enforce the debt and no question of scaling it down could arise. In revision it was contended that the petitioner was entitled to redeem the plaintiff's usufructuary mortgage by virtue of the lease alleged to have been obtained by the petitioner from the mortgagor subsequent to the plaintiff's mortgage and he was thus interested in raising the question as to the true amount payable to the plaintiff.

Held, the petitioner was interested in raising the question as to the true amount payable to the plaintiff and he must be allowed to file the additional written statement.

P. Somasundaram for Petitioner.

V. Viyyanna for Respondent.

K. S.

The Chief Justice and Krishnaswami Aiyangar, J. C. M. P. No. 990 of 1940.

2nd April, 1940.

Madras Hindu Religious Endowments Act (II of 1927), Ss. 44-B—Rejection by Revenue Divisional Officer of application for directing resumption of service inams—Right of appeal to Collector.

The District Collector is empowered by Cl. *(d)* (1) to make the order of resumption in a case where the Collector refuses to make it in the first instance. Not only are the words "confirming, modifying or cancelling" in the clause is of sufficient amplitude but it is an ordinary incident of the powers of an appellate tribunal to make the order which the tribunal of first instance failed to make.

I.L.R. 10 Mad. 179, applied.

V. V. Chowdary, M. Seshachalapathi, N. Kotiswara Rao and *A. Venkataswami* for Petitioners.

The Government Pleader (B. Sitarama Rao) for Respondents.

K. S.

Lakshmana Rao, J. Crl. R. C. No. 25 of 1940.

3rd April, 1940.

Indian Penal Code (XLV of 1860), S. 498—Charge of enticing away a married woman—Long course of living as husband and wife by complainant and woman—If raises presumption of marriage—Failure of complainant to pay woman's first husband the marriage expenses—Invalidity of divorce—Effect.

The complainant married P. W. 8 and both of them lived as husband and wife for nearly fourteen years, when the complainant prosecuted the accused successfully under S. 498, I. P. Code, for "having enticed away a married woman". It transpired that P. W. 8 married another before the complainant, and according to the custom of the caste the complainant did not pay the first husband the marriage expenses to obtain a valid divorce. In revision, the conviction was set aside on the ground that the marriage of the complainant himself cannot be held to be legal, and the presumption raised by a long course of living as husband and wife is inconclusive.

K. Ramamurty, K. Srinivasa Rao and *K. Someswara Rao* for Petitioner.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

Wadsworth and Patanjali Sastri, JJ. A. S. No. 351 of 1937.

4th April, 1940.

Will—Recitals in—How far evidence of title.

A, alleging that the suit properties constituted his self-acquisitions bequeathed them to his grandson *C*. *A's* son *B* alienated the said properties during the minority of *C* as his guardian for the discharge of *B's* debts. *A*, *B* and *C* were members of a joint Hindu family. *C* filed a suit after attaining majority for recovery of the items after setting aside the alienations.

Held, that the recitals in a will though admissible in evidence under S. 32 (7) of the Indian Evidence Act are insufficient to create title in the absence of evidence *aliunde* and consequently, plaintiffs' suit must fail for want of strict proof of title and as the son is bound by his father's antecedent debts.

K. Ramamurty and *K. Someswara Rao* for Appellants.

K. Kameswara Rao and *Inampudi Suryanarayanamurthi* for Respondent.

K. S.

Pandrang Row, J. C. R. P. Nos. 205 to 209, 246 to 249, 459 and 460 of 1939.

5th April, 1940.

Madras Agriculturists' Relief Act (IV of 1938), S. 15 and S. 3 (4)—"Jodi"—If rent within the meaning of the Act.

Jodi payable by whole village inamdar to a zamindar is not rent within S. 3, Cl. (4) of the Agriculturists' Relief Act and it is not liable to be relieved against under S. 15 of the Act.

T. R. Arunachalam and *D. R. Krishna Rao* for Petitioners.

K. S. Sankara Aiyar, A. K. Sreeraman and *D. Ramaswami Aiyangar* for Respondents.

K. S.

Venkataramana Rao, J. S. A. No. 196 of 1937.
15th March, 1940.

Madras Revenue Recovery Act (II of 1864), Ss. 38 and 59—Person with agreement for sale of land—If person aggrieved who can sue for setting aside sale—Limitation for suit for setting aside sale—Revenue Divisional Officer—Jurisdiction to confirm sale.

By an agreement of sale dated 3rd September, 1927, the plaintiff agreed to purchase from *S* certain lands and got possession of the same and was in enjoyment thereof ever since. On 9th February, 1928, the fourth defendant obtained a sale deed of the said lands from *S*, with full knowledge of the agreement of sale in plaintiff's favour and his possession of the lands, and had the sale registered in his name in the revenue accounts. The patta issued in fourth defendant's name comprised those lands among others. Fourth defendant filed a suit to recover possession of the lands from the plaintiff and the suit was dismissed and dismissal confirmed on appeal on 22nd February, 1932. Till the end of 1931 the fourth defendant paid the taxes but after the decision in the appeal he committed default and the lands were put up for sale and purchased by fifth defendant on 18th July, 1932, and sale confirmed on 28th September, 1932, by the Revenue Divisional Officer. Plaintiff sued to set aside the sale.

Held, (*i*) the plaintiff is a person aggrieved within the meaning of S. 59, Revenue Recovery Act. (*ii*) The Revenue Divisional Officer can by virtue of Madras Regulation VII of 1928, exercise the power conferred on the Collector under S. 38, Revenue Recovery Act, to confirm a sale. (*iii*) The plaintiff became aware of the fraud on 15th November, 1932, and sale was on 18th July, 1932, and before the time for limitation would expire under S. 59 he has moved the Collector by an application to annul the sale. On 30th June, 1933, the Collector declined to interfere and the order of the Revenue Divisional Officer must be deemed to have been confirmed by him on that date and period of six months allowed for bringing the suit under S. 59 of the Act must be calculated from that date.

K. V. Srinivasachari and *K. V. Rangachari* for Appellants.

The Government Pleader (B. Sitarama Rao) and *Y. Satyanarayana* for Respondents.

K. S.

Burn, J. S. A. No. 121 of 1937.
15th March, 1940.

Hindu Religious Endowments Act (II of 1927), S. 9 (11)—Provision for "Abishekam" to deity "Maheswara Puja" and "Samaradhana"—Whether religious endowment—If dedication for benefit of Hindu public.

A trust deed provided that abhishekam was to be done to Dandayudhapani Swami at Palni and that the pot in which Cauvery water was taken to Palni must be brought back and then "Maheswara Puja" was to be done in the house and "Samaradhana" to follow.

Held, it is a religious endowment. But it did not amount to a dedication of anything for the benefit of the "Hindu public" of the village or any specified person or class of persons. The only party for whom something definite is to be done is *Dandayudhapani* and he alone (or some one interested in his worship) could maintain a suit on the trust deed.

A. V. Narayanaswami Aiyar for Appellant.

C. D. Venkataraman for Respondents.

K. S.

N R C

King, J., C. M. A. No. 267 of 1939.
28th March, 1940.

Will—Absolute rights given to daughter—After her to son's children—Final clause mentioning absolute rights to daughter in the stridhana property—How will to be given effect to.

A testatrix gave away her stridhana properties to her daughter with all her rights therein and absolutely. It was provided in the will that after the lifetime of the daughter, her son's children should get them and enjoy them from generation to generation without powers of alienation. At the end there was a clause that the daughter had full rights in the properties. The Lower Appellate Court held that the provision about the testatrix's grand-children must be given effect to and hence the daughter, on the construction of the will, took only a life estate.

Held, when absolute rights are given to a person without any restriction and a gift over is made, the absolute rights are not affected and in this case the daughter took an absolute estate.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Appellant.

N. Visvanatha Aiyar and *N. V. Nagaraja Aiyar* for Respondent.

K. C.

Pandrang Row, J. C. R. P. No. 1168 of 1937
29th March, 1940.

Surety for proper administration of property—When can be released from the bond.

A junior member of a tarwad, who had executed a surety bond for the proper administration of tarwad affairs and properties by the karnavan, applied to be discharged from the bond on the ground (1) that he is not prepared to continue to remain bound and that he wanted to dispose of some of his properties and (2) that he had lost faith in his karnavan.

Held, the surety cannot be allowed to free himself of his own sweet will but must obtain leave of the Court. 1926 M.W.N. 493, followed. And leave of Court can only be given for good cause, which would depend on the circumstances of each case. Leave can be given if another surety is found.

I.L.R. 54 All. 293 and I.L.R. (1939) 2 Cal. 1, referred.

A. Atchuthan Nambiar for Petitioner.

M. Govindan Nambiar and *C. Govindan* for Respondents.

K. S.

Pandrang Row and Horwill, JJ. A. S. Nos. 352 and 353 of 1937.
5th April, 1940.

Co-operative Societies Act (VI of 1932), S. 48—Right of Civil Court to interfere—President of a Society resigning—Liquidation of the Society—Contribution order against resigned president—Notice under S. 80, C. P. Code to liquidator before suit by the aggrieved party whether necessary—Contribution order illegal.

G, a president of a Co-operative Society, resigned his presidentship and membership by a letter dated 4th June, 1930. Subsequently the Society went into liquidation and two years after his resignation, the liquidator of the Society made two contribution orders against *G*. *G* appealed to the Registrar of the Co-operative Societies without success. He applied for leave to institute suits against the liquidator which was refused. Then he filed two suits disputing the validity of the orders of the Liquidator. The trial Court found

all points in favour of *G* but dismissed the suits on the ground that the liquidator was a public officer and hence notice under S. 80 ought to have preceded them.

Held, (1) a liquidator was not a public officer within the meaning of S. 2 (7) of the Civil Procedure Code.

A.I.R. 1934 Nag. 201 and A.I.R. 1939 Nag. 232, not followed.

(2) That the resignation of *G* was complete when his letter was received by the Society.

(1896) 1 Ch. 409 (C A.) and (1907) 2 Ch. 370, followed.

14 Q.B,D. 908, referred to.

45 M.L.J. 798 and (1932) M.W.N. 18, distinguished.

(3) Hence the liability of '*G*' ceased two years after his resignation and the orders for contribution were illegal.

I.L.R. 59 Mad. 895, followed.

(4) The Civil Courts have jurisdiction to decide whether such orders were legally passed and it is not taken away by the first part of S. 48 of the Co-operative Societies (Madras Act VI of 1932).

I.L.R. 59 Mad. 895, I.L.R. 18 Lah. 649; and I.L.R. 14 Lah. 703, followed.

I.L.R. (1937) Mad. 211, distinguished.

(5) The suits must however fail because of absence of leave under the latter part of S. 48 of the Co-operative Societies Act.

K. Bhashyam Aiyangar and *T. R Srinivasan* for Appellant.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Respondent.

K. C.

Patanjali Sastri, J.
5th April, 1940.

C. R. P. No. 256 of 1937.

Civil Procedure Code (V of 1908), S. 73—Funds in hands of garnishee—Attachment of and deposit in Court—Subsequent attachment before judgment and application for rateable distribution after obtaining decree.

The petitioner obtained a decree in 1932 and in execution thereof attached a fund belonging to the judgment-debtor in the hands of the President, District Board, Vizagapatam who deposited the amount into Court. Thereafter the respondent obtained an attachment before judgment of the said fund, and after subsequently obtaining a decree applied for rateable distribution in the said fund,

Held, in revision that, as soon as the garnishee deposited the amount into Court, it became assets realised in that particular decree, and no further order for appropriation is necessary, and the respondent is not entitled to have rateable distribution.

I.L.R. 19 Mad. 72, followed.

I.L.R. 44 Mad. 100 (F.B.); I.L.R. 46 Mad. 506 (F.B.) and A.I.R. 193 Mad. 4, distinguished.

Kasturi Seshagiri Rao and *K. Someswara Rao* for Petitioner.

Y. Suryanarayana for Respondent.

K. S.

Lakshmana Rao, J. Crl. R. C. No. 230 of 1940 and
10th April, 1940. Crl. R P. No. 221 of 1940.

Criminal Procedure Code (V of 1898), Ch. XXI—Case converted into Preliminary Register Case—Need to give accused a further opportunity to cross-examine prosecution witnesses.

Where a case inquired into under Ch. XXI, Criminal Procedure Code is, converted into a Preliminary Register Case the accused should be given a further opportunity to cross-examine the prosecution witnesses.

V. T. Rangaswamy Aiyangar and *K. S. Sankararaman* for Petitioner.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

Lakshmana Rao, J. Cr. A. No. 639 of 1939
10th April, 1940.

Defence of India Rules, r 34, cl. 6—"Prejudicial acts"—Meaning.

The accused had exhorted the audience in two speeches to desist from enlisting in the army or assisting the prosecution of the war in any manner.

Held, the speeches were "prejudicial acts" as defined in sub-cl. (*d*) and (*k*) of r. 34, cl. (6) and he can be convicted under r. 38, cl. (5).

S. Suryaprakasam for Appellant (Accused).

C. V. Nagaraja Sastri for *The Crown Prosecutor* on behalf of the Crown.

K. S.

Lakshmana Rao, J. Crl. R. C. No. 59 of 1940 and
11th April, 1940. Crl. R P. No. 56 of 1940.

Criminal Procedure Code (V of 1898), S. 145—Procedure.

It is incumbent on the Magistrate to determine who was in possession on the date of the preliminary order under S. 145 (*b*) and if he is unable to decide or satisfy himself as to which of the parties was in possession he has to proceed under S 146 (1) of the Code of Criminal Procedure.

K. S. Jayarama Aiyar for Petitioner.

K. Suryanarayana for Respondent.

The Public Prosecutor (V. L. Ethiraj) on behalf of the Crown

K. S.

Krishnaswami Aiyangar, J. C. R. P. Nos. 118 of 1938 and
12th April, 1940. 129 of 1938.

Execution—Joint decree—Mamool arrangement to receive proportionate amount from each judgment-debtor—Whether can be pleaded in execution.

A zamindar obtained a joint decree against various people who held a village in shares for jodi. The whole decree was sought to be executed against one of them who contended that as there was a mamool arrangement to take a proportionate share from each judgment-debtor the whole decree could not be executed against one alone.

Held, that the mamool arrangement cannot be pleaded as a bar to execution.

I.L R. 58 Mad. 994 (F.B.), referred to and distinguished.

D. R. Krishna Rao for Petitioner.

D. Ramaswami Aiyanar and *A. K. Sreeraman* for Respondents.

K. S.

The Chief Justice and Krishnaswami Aiyangar, J. Appeal No. 229 of 1937.
6th March, 1940.

Madras Hindu Religious Endowments Act (II of 1927), S. 63 (4)—Refusal of Board to hold inquiry or frame a scheme—Court if can frame a scheme.

Sec. 63 of the Madras Hindu Religious Endowments Act does not give authority to the Court to frame a scheme in the event of the Board refusing to do so. The only orders which the section refers to are: (1) an order settling a scheme, (2) an order modifying a scheme, and (3) an order cancelling a scheme. The words "institute a suit in the Court to modify or set aside such order" are intended only to refer to an order settling a scheme or modifying or cancelling one.

I.L.R. 10 Mad. 179, distinguished.

Sec. 65 is merely intended to give the Court power, after a scheme has been framed to modify or cancel it at any time. Nor is there any residuary power in the Court to frame a scheme. The powers under S. 92, Civil Procedure Code, have been replaced by the Madras Hindu Religious Endowments Act and that Act alone can be looked at for ascertaining the powers of a Court to frame a scheme.

K V. Sesha Aiyangar and *R. Desikan* for Appellant.

K E. Rajagopalachariar for Respondent.

K. S.

Wadsworth, J. C. R. P. No. 197 of 1937.
29th March, 1940.

Civil Procedure Code (V of 1908), S. 73—Official Receiver authorised to sell non-insolvent sons shares also within three months—Sale after that time when Court had decided to withdraw the power—Receipt of amount by receiver and payment into Court executing against son's shares after confirmation of sale—Application for execution between date of receipt of amount and date of deposit into Court—Right to rateable distribution.

The Official Receiver was authorised to sell the non-insolvent son's share also within three months and pay the money into execution Court. The sale did not take place within the time and pending proceedings to withdraw the sale from the Official Receiver and for sale through Court, the Official Receiver actually sold the property on 28th October, 1935, the price being received by the Official Receiver in two instalments on 29th October, 1935 and 7th November, 1935. Two other creditors filed execution petitions on 30th November, 1935 and 20th December, 1935, respectively. Sale was drawn up on 30th March, 1936 and son's share of sale proceeds paid into Court by the Official Receiver. The sale was finally ratified by the Court on 8th April, 1936.

Held, the date of the receipt of the assets by the Court must be the date on which the money was actually paid by the Official Receiver into the Court. The two creditors who filed the subsequent execution petitions will be entitled to share rateably in the sale proceeds.

R. Rangaswami Aiyangar for Appellant.

K. Rajah Aiyar for Respondent.

K. S.

N R C

Pandrang Row and Horwill, JJ.. Appeal No. 15 of 1937.
1st April, 1940.

Tort—Premises used by tenant for storing combustible material—Accidental fire—Principle of res ipsa loquitar—*Applicability—Liability of tenant to landlord for destruction of premises by the fire.*

Having regard to the nature and quantity of the material stored in the premises (chemicals and mordanted yarn) it was clearly the duty of the person in occupation to take special care and precaution against fire and where no such precautions were taken and no attempt was made to rescue anything from the fire, nor even to get the water from the well hard by, the maxim of *res ipsa loquitar* would apply to the case. In the circumstances of the case it was the negligence of the tenant which caused the fire which burnt down in part the house of the plaintiff and the plaintiff is entitled to damages for the loss.

S. Nagaraja Aiyar and *J. R. Alwar Naidu* for Appellant.

V. Minakshisundaram and *O. V. Baluswami* for Respondents.

K. S.

Mockett, J. C. R. P. No. 60 of 1937.
2nd April, 1940.

Surety—Arrest of debtor in execution of small cause decree—Sureties making themselves responsible for filing insolvency petition within 30 days of bond—Filing of petition in wrong Court—Dismissal and subsequent filing of petition in proper Court beyond one month from date of surety bond—Enforcibility of bond against sureties.

When a debtor was arrested in execution of a small cause decree two sureties executed a bond making themselves responsible for filing the insolvency petition within 30 days of bond. A petition was filed in a wrong Court within time and was dismissed. Subsequently another petition was filed long out of time.

Held, that no proper insolvency petition was filed at all. The surety cannot rely on any insolvency petition having been filed at all. The condition in the suretybond not having been fulfilled the decree-holder is entitled to enforce the conditions of the bond.

52 M.L.J. 523 followed.

K. Kuttikrishna Menon for Appellants.

D. A. Krishna Wariar for Respondents.

K. S.

The Chief Justice and C. M. P. No. 5569 of 1939.
Krishnaswami Aiyangar, J.
2nd April, 1940.

Madras Local Boards Act (XIV of 1920), S. 193—Power of President of Panchayat Board to grant or refuse a licence.

Under S. 193 of Madras Local Boards Act the President of a Local Board has in a proper case the power to refuse to renew a licence. His order can only be set aside if he has exercised that power in an arbitrary or illegal manner.

K. Bhashyam Aiyangar and *T. M. Venugopal* for Petitioner.

K. Rajah Aiyar for Respondent.

K. S.

King, J. C. C. C. A. Nos. 54 and 55 of 1938.
2nd April, 1940.

Religious Endowments Act (XX of 1863)—Trustees appointed by Hindu Devasthanam Committee—Dismissal by Committee—Whether can be at its own pleasure or must be only for good and sufficient cause—Power of Committee to appoint trustees for limited period.

Trustees to be in management of Thiruvatteeswaran Devasthanam in Madras, were appointed under Act (XX of 1863) by Madras Hindu Devasthanam Committee. When a vacancy occurred in 1934 the committee appointed a trustee for a period of 3 years. A previously appointed trustee objected to the new trustee taking charge on the ground that he could not be appointed for a limited period and could only be appointed for life. On the failure of the protesting trustee to appear before the Committee to consider his conduct in disobeying the Committee's orders, he was dismissed. That trustee then filed a suit for a declaration that his dismissal was illegal and he had also filed a suit for declaration that the new trustee was not lawfully appointed. The City Civil Judge dismissed both the suits and on appeal,

Held, (1) The status of a trustee is not that of a servant and he can be dismissed only on good and sufficient grounds and after an enquiry into the facts and that a dismissal which is not justified may be set aside by the Courts of law.

Case-law discussed.

(2) A temporary appointment cannot be held to be void in all circumstances and the appointment for three years in this case is valid.

V. Ganapathi Aiyar and *A. Venkatasubba Mudaliar* for Appellants.

T. R. Srinivasa Aiyar, S. G. Rangaramanujam and *T. Pattabhirama Aiyar* for Respondents.

K. S.

Krishnaswami Aiyangar, J. C. R. P. No. 1569 of 1936.
5th April, 1940.

Decision by competent Court based on oath—Conclusiveness in later suit on same point.

The decision of a competent Court though based on oath is conclusive on the point in controversy in a later suit.

I.L.R. 36 Mad. 287 and I.L.R. 24 Mad. 444, followed.

V. Subramaniam for Petitioner.

P. Satyanarayana for Respondent.

K. S.

The Chief Justice and Patanjali Sastri, J. C. M. P. No. 1909 of 1940.
18th April, 1940.

Practice—Appeal to Privy Council—Petition of appeal not lodged in Privy Council—Withdrawal of appeal—Procedure.

Where an appellant wants to withdraw his appeal, where a petition of appeal has not been lodged in the Privy Council, rule 32 of the Judicial Committee rules 1925 requires that the appellant shall give notice in writing to the Registrar of the Privy Council that he desires to withdraw his appeal. The Registrar of the Privy Council is then required to notify the Registrar

of the Court appealed from and the appeal shall thereupon stand dismissed as from the date of the letter of the Registrar of the Privy Council without further order.

S. Kothandarama Nainar for *Ch. Raghava Rao* for Petitioner.

V V. Raghavan for *V. Govindarajachari* for Respondents.

K. S.

[F. B.]

The Chief Justice, Krishnaswami Aiyangar, and Somayya, JJ. S. A. No. 1152 of 1936.

23rd April, 1940.

Hindu Law—Maintenance—Destitute widowed daughter—Legal right to be maintained out of father's estate in the hands of his heir.

A father is under a moral obligation during his lifetime to maintain out of his properties his widowed indigent daughter, who is unable to get support from her husband's estate. This moral obligation ripens into a legal obligation on the death of the father, when his property is inherited by his heir. The widowed daughter is entitled to a decree for maintenance against such heir, payable out of the properties inherited.

Hindu Law text and case-law reviewed.

Observations of *Ranade, J.* in 23 Bom. 291 dissented from.

Remarks of *Sadasiva Aiyar, J.*, in 23 M.L.J. 223, held to be somewhat wide.

I.L.R. 11 All. 194 and L.R. 61 I.A. 29, relied on.

A. Swaminatha Aiyar and *S. Thyagaraja Aiyar* for Appellants.

E. Vinayaka Rao for Respondents.

K. C.

[F. B.].

The Chief Justice, Mockett and Krishnaswami Aiyangar, JJ. S. A. No. 255 of 1937.

23rd April, 1940.

Limitation Act (IX of 1908) Arts. 142 and 144—Purchaser in sale in execution of mortgage decree—Suit for possession against person claiming to be in possession adversely to mortgagor—Burden of proof.

In a sale in execution of a mortgage decree plaintiff purchased the suit properties. In 1931 he filed a suit for possession against the first defendant who claimed to be in adverse possession from 1909 and impleaded the mortgagor also,

Held, The burden of proof was on the plaintiff to prove that he was in possession within twelve years prior to the suit. Mere proof of title was not enough to place the burden of proof on the defendant.

16 Cal. 473 (P.C.) followed.

21 L.W. 398 and 25 L.W. 127, overruled.

50 M.L.J. 183 distinguished.

K. R. Vepa for Appellant.

A. Lakshmayya for Respondent.

K. S.

Wadsworth and
Patanjali Sastri, JJ. C. R. P. No. 2543 of 1939.
9th April, 1940.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 3 and 8—Decree of 1936 on a pronote of 1928 in renewal of earlier pronote of 1925—Debt which is to be scaled down.

A decree was passed on 21st August, 1936, on the basis of a promissory note of 1928 which promissory note was in renewal of an earlier promissory note of 1925. In an application by the debtor for scaling down the debt,

Held, as the decree merely enforces the payment of a pre-existing debt bearing interest, the pre-existing debt should be regarded as the liability to be scaled down and governed by S. 8 and not by S. 9.

Case-law examined.

A. Lakshmayya for Petitioner.

D. Narasaraju (Amicus curiae) for Respondent.

K. S.

Krishnaswami Aiyangar, J. C. R. P. No. 73 of 1937.
12th April, 1940.

Civil Procedure Code (V of 1908), O. 5, r. 19—Declaration as to sufficiency of service—If could be implied or should be express— Constructive res judicata—*If applicable when party sought to be bound had no knowledge of facts forming basis of his objections.*

An assignee of a decree applied for recognition of the assignment and for execution. Notice was taken to the judgment-debtor. As he declined service, it was affixed. The Court noted "notice refused hence affixed, defendant absent" and then ordered the petition. In the next application by the assignee of the decree the judgment-debtor objected to the execution on several grounds and contended that the order recognising the assignment will not be *res judicata* for two reasons that,

(*a*) there was no declaration as to service sufficient under O. 5, r. 19, C. P. Code and,

(*b*) that he was not aware of the facts relating to the objections now raised and hence there could be no constructive *res judicata.*

Held, (1) that though there was no specific order declaring service sufficient still such an order could be implied from the language of the order.

(1939) 2 M.L.J. 926, followed;

64 M.L.J. 629 distinguished and,

(2) that the rule of constructive *res judicata* has no application where the party who is sought to be bound by it has no knowledge of the facts forming the basis of the objections.

42 C.W.N. 560, followed.

T. V. Muthukrishna Iyer for Petitioner.

A. Srirangachariar and *T. R. Srinivasan* for Respondent.

K. C.

King, J. A. A. O. No. 617 of 1938.
19th April, 1940.

Evidence Act (I of 1872), S. 116—Tenant contending that lease deed was sham and nominal transaction never intended to be put into operation at all—Whether barred by S. 116.

Where a person who has executed the lease deed contends that the lease deed was never meant to be put into operation at all, it follows that if his plea is true, he was never a tenant If a man is not a tenant, he cannot be estopped under S. 116 from proving his contention.

I.L.R. 19 Bom. 133 referred.

V. Govindarajachariar and *K. S. Narayana Aiyar* for Appellant

T. E. Ramabhadrachariar for Respondent.

K S.

Wadsworth, J C. R P. No. 315 of 1937.
19th April, 1940.

Provincial Insolvency Act (V of 1920), Ss 53 and 54—Onus of proving want of consideration.

In a case under Ss. 53 and 54 of the Provincial Insolvency Act, the *onus* of proving want of consideration lies in the first instance on the Official Receiver. But when the alienee admits the truth of the Official Receiver's evidence that the money was not paid as recited in the document but was paid after registration before witnesses other than those who attested the document the burden shifts to the alienee to adduce at any rate *prima facie* evidence of the special circumstances alleged.

S. Venkatesa Aiyangar for Petitioner.

K.R Vepa for Respondent.

K. S.

[F. B.]

The Chief Justice, King and Somayya, JJ.
26th April, 1940.

Appeals Nos 234 and 235 of 1937 and C. M. Ps. Nos. 980 and 981 of 1940.

Evidence Act (I of 1872), Ss. 74 and 65 (e)—Returns under S. 22 of the Income-tax Act—If public documents within S. 74, Evidence Act—Admissibility of certified copies in evidence under S 65 (e) of Evidence Act.

In a suit on lost pronotes a certified copy of the plaintiff's income-tax return was tendered in evidence to prove the notes.

Held, the returns would be public documents within the meaning of Evidence Act, S. 74 and secondary evidence of the same would be admissible in evidence under S. 65 (*e*) of the Evidence Act.

I.L.R. 2 Rang. 391; I.L.R. 56 Bom. 324 not followed.

50 L.W. 827: I.L.R. 1940 Mad 329 referred to.

P. V. Rajamannar, K. Subba Rao and *D. Suryaprakasa Rao* for Appellants.

Sir Alladi Krishnaswami Ayyar, Nugent Grant and *V. Suryanarayana* for Respondents.

K. S.

Wadsworth and
Patanjali Sastri, JJ.
10th April, 1940.

C. R. P. Nos. 1115 and 1106 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 9—Original debt by non-agriculturist—Supersession by a fresh pronote by original debtor along with an agriculturist—Applicability of S. 9.

A promissory note by two brothers *A* and *B* on 8th October, 1934, was in supersession of an earlier promissory note executed on 28th May, 1930, by one of them alone, who was not an agriculturist within the purview of the Act. The other brother claimed the benefit of the Act on the basis that the debt upon which he has been sued was in renewal of a prior debt so far as he is concerned.

Held, as the original "debt" was not a debt due from an agriculturist as defined in S. 3, it is not open to the agriculturist brother to call in aid S. 9 on the ground that the debt upon which he is sued is in renewal of a prior debt.

S. Ramachandra Aiyar for Petitioner.

N. Muthuswami Aiyar and *N. Ramanatha Aiyar* for Respondents.

K. S.

The Chief Justice and
Krishnaswami Aiyangar, J.
11th April, 1940.

C. M. P. No. 4901 of 1939.

Civil Procedure Code (V of 1908), S. 111 (a) *as amended by Government of India (Adaptation of Indian Laws), Order, 1937—Appeal to Federal Court —Decision of single Judge of High Court—Certificate under Government of India Act 1935, S. 205 (1) that case involves important question as to the interpretation of Government of India Act—Leave to appeal to Federal Court.*

At the time of dismissing a revision petition (against an order scaling down a debt under Madras Act IV of 1938) following the Full Bench decision that the Act was *intra vires* the Judge gave a certificate under the Government of India Act, S. 205 (1) that the case involved an important question on the interpretation of the constitution Act. The present application for leave to appeal to the Federal Court was opposed on the ground that no appeal lay from the order of a single Judge of a High Court and reliance was placed on S. 111 (*a*) of Civil Procedure Code as amended by the Government of India (Adaptation of Indian Laws), Order, 1937. After an examination of the relevant provisions of the Civil Procedure Code and Government of India Act.

Held, the order of the Judge was a final order and Cl. 15 of the Letters Patent prohibits an appeal from an order passed by the Court in the exercise of its revisional powers and the Judge having given the certificate under the Government of India Act, S. 205 (1) leave to appeal must be granted.

V. V. Srinivasa Aiyangar and *P. S. Sarangapani Aiyangar* for Petitioner

B. K. B. Naidu and *R. Muthialuswami* for Respondent.

K S.

Krishnaswami Aiyangar, J.
12th April, 1940.

C. R. P. No. 1116 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 23, Proviso—Scope and effect.

N R C

The proviso only requires notice to go to the auction purchasers before an order is made under the section. This can be done after the period of 90 days provided the petition is filed within the period limited.

N. Srinivasa Aiyangar for Petitioner.

A. V. Viswanatha Sastri and *T. E. Gopalan* for Respondent.

K. S.

Wadsworth, J C. R. P. No. 20 of 1939.
23rd April, 1940.

Provincial Small Cause Courts Act (IX of 1887), Art. 31—Person claiming share of profits from other co-owner in possession between preliminary and final decree for partition—If suit falls under Art. 31 of Provincial Small Cause Courts Act.

The parties were co-owners during the interval between the preliminary and final decree in a partition suit and the plaintiff alleged a wrongful failure to give the plaintiff her share of those profits.

Held, such a suit does not come under Art. 31 of the Provincial Small Cause Courts Act.

A.I.R. 1930 Lah. 613 and I.L.R. 40 All. 666, followed.

P. R. Ramakrishna Aiyar for Petitioner.

G. N. Thirumalachariar for Respondent.

K. S.

Horwill, J. C. R. P. No. 435 of 1937.
24th April, 1940.

Civil Procedure Code (V of 1908), S. 73—Rateable distribution—Person merely attaching before judgment—If entitled to rateable distribution.

Court can only divide the assets among such persons as may have made application to the Court for the execution of decrees. So where a creditor merely gets an attachment before judgment he is not entitled to claim rateable distribution of assets realised in execution before he took out execution proceedings.

I.L.R. 47 Mad. 483 (F.B.), referred.

K. P. Ramakrishna and *P. Sridhara Rao* for Petitioner.

P. Govinda Menon for Respondent.

K. S.

Abdur Rahman, J. C. R. P. No. 856 of 1940.
1st May, 1940.

Suits Valuation Act (VII of 1887), S. 8—Mortgage suit—Suit for redemption and recovery of surplus profits—If claim for distinct subjects—Jurisdictional valuation.

Where the main relief claimed by a plaintiff in a mortgage suit is for redemption and the prayers for surplus profits or for accounts are only subservient to the main relief claimed, the value placed on the relief for redemption would cover the relief in regard to surplus profits as well and the latter need not be valued separately.

60 M.L.J. 698 and I.L.R. 45 All. 154, followed.

M. Shama Das for Petitioner.

S. Narayana Aiyangar for Respondent.

K.S.

[END OF VOLUME]